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No. _____

In The

Supreme Court of the United States

COUNTY OF SAN DIEGO; RUDOLPH TAMAYO; EDWARD BAKER; GABRIEL RODRIGUEZ,

Petitioners,

vs.

RICHARD McALINDIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Americans With Disabilities Act ("ADA") requires an employer to provide "reasonable accommodations" for an employee's alleged impotence.

Whether the ADA requires an employer to provide "reasonable accommodations" for occasional insomnia, where the alleged impairment does not limit the employee's ability to perform the essential functions of his position.

Whether the ADA requires an employer to transfer an employee to the same type of position in a different department as a "reasonable accommodation" of an employee's inability to get along with his co-workers.

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PETITION FOR WRIT OF CERTIORARI

The County of San Diego ("County") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-29) is reported at 192 F.3d 1226 (9th Cir. 1999), *modified*, 201 F.3d 1211 (9th Cir. 2000). The opinions of the district court (App. 30-63) are unreported.

JURISDICTION

The court of appeals entered its modified judgment in this case on January 18, 2000. App. 1. The County filed this petition within 90 days of the denial of rehearing, pursuant to Supreme Court Rule 13.1. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Title 42 United States Code section 12112 provides:

(a) General rule

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to

job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes -

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

Section 12111(8) of United States Code Title 42 provides:

Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Section 12111(9) provides:

Reasonable accommodation

The term "reasonable accommodation" may include -

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations; training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

STATEMENT OF THE CASE

Richard McAlindin ("McAlindin") sued the County and his supervisors in 1994, alleging disability discrimination under the ADA, 42 U.S.C. § 12100 et seq.[1] The district court had jurisdiction over McAlindin's claims under 28 U.S.C. § 1331 (general federal question jurisdiction). The district court granted summary judgment in favor of the County on McAlindin's ADA claim, which is premised on McAlindin's anxiety disorders. The Ninth Circuit reversed.

A. The ADA Claims

McAlindin has worked for the County as a systems analyst since 1983, and continues in that position to date. McAlindin received a provisional promotion in 1989, and found his new duties to be stressful. McAlindin was granted stress leave in 1989, after he complained that his supervisors disregarded his complaints about a vendor. McAlindin took stress-related leave again in 1992, during

[1] McAlindin also alleged state law claims that were resolved in favor of the County and are not at issue here.

which time his attorney requested that McAlindin be transferred to a different position as a systems analyst, because of McAlindin's "negative associations" with his current position. The County responded that it would explore ways of accommodating McAlindin in his present position, rather than transferring him.

Over the years, McAlindin has been diagnosed with anxiety disorders, which have been treated by psychotherapy and various medications. In 1993, McAlindin was examined by a County-retained psychiatrist, who concluded that McAlindin needed more intense treatment but could return to his position within six weeks after receiving such treatment. After McAlindin returned, he was given one written warning for sleeping at work. McAlindin suffered no adverse employment action as a result of this warning. McAlindin also requested off-site computer training, but his request was denied because the County provides on-site training.

B. Proceedings Below

McAlindin subsequently brought this suit for disability discrimination under the ADA and state law. On December 5, 1995, the district court granted in part and denied in part the County's motion for summary judgment. The court ruled in the County's favor on McAlindin's ADA claim, finding that McAlindin did not have a "disability" within the meaning of that act. The court also dismissed McAlindin's state law claims for age and disability discrimination, but allowed McAlindin to amend his complaint to add new allegations regarding retaliation. App. 39-63. On September 12, 1997, the district court

granted summary judgment on most of the retaliation claims, but denied summary judgment on the remaining claims. App. 30-38. McAlindin chose to dismiss the remaining retaliation claims so that he could appeal. On September 29, 1997, the district court entered final judgment. McAlindin filed a timely appeal with the Ninth Circuit.

On September 16, 1999, the Ninth Circuit affirmed the district court's decision in part and reversed in part. App. 1. On October 1, 1999, the County filed a timely petition for rehearing with a suggestion for rehearing en banc. On January 18, 2000, the Ninth Circuit denied the petition for rehearing, but modified its opinion. App. 2-3.

In the modified opinion, the Ninth Circuit affirmed the ruling in favor of the County on McAlindin's retaliation claims, but reversed the district court's ruling on the ADA claims. App. 3-4. The court noted that McAlindin's anxiety disorders were controlled by medication, thereby negating McAlindin's ability to assert those disorders as a disability. App. 16-17.[2] However, the court held that McAlindin's declaration in opposition to the County's summary judgment motion established a genuine issue of material fact as to whether McAlindin has an actionable disability under the ADA, either as a result of, or despite, the medication. App. 17.

In his declaration, McAlindin alleges that he suffers from impotence as a result of the medications he takes for

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[2] *See, Murphy v. United Parcel Service*, 119 S.Ct. 2133 (1999) and *Sutton v. United Airlines, Inc.*, 119 S.Ct. 2139 (1999).

anxiety, and that he "experiences problems" with sleeping despite the medication. App. 4-5. Additionally, although McAlindin himself did not assert this point, the court relied on medical reports from various doctors, which were prepared prior to McAlindin's successful return to work, to find that there is a question of fact as to whether McAlindin has "difficulty interacting with others." App. 15-17 & n.9.

The court rejected the County's argument that McAlindin's requested accommodation, a transfer to another systems analyst position in a different department, was unreasonable. The court stated that a transfer (or other accommodation) would not be unreasonable unless it created an "undue hardship" for the County. App. 19. The court concluded that a transfer did not appear to be unduly burdensome.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts with the decisions of other circuits on fundamental issues, such as when the ADA requires accommodations and what accommodations are "reasonable." Conflicts on such key issues, in an area that generates as much litigation as does the ADA, makes certiorari appropriate.

The Ninth Circuit's decision finds potential liability for failure to accommodate McAlindin's alleged impairments, even though the impairments do not limit McAlindin's ability to perform the essential functions of his position. This conflicts with the decisions of the Fifth

Circuit, which hold that the ADA requires accommodations *only* for such limitations.

Additionally, the decision holds that a transfer may be a reasonable accommodation for McAlindin's alleged impairments. This conflicts with decisions of the Third Circuit, which hold that a transfer is unreasonable as a matter of law where, as here, an employee seeks a transfer because he is "stressed-out" by his coworkers. The decision also conflicts with decisions from other circuits, the ADA's legislative history, and interpretive guidelines. Under these authorities, a transfer is reasonable in other circumstances *only* if the employee cannot be accommodated in his present job.

I

THE DECISION HERE CONFLICTS WITH DECISIONS OF THE FIFTH CIRCUIT, WHICH HOLD THAT EMPLOYERS MUST ACCOMMODATE LIMITATIONS, NOT DISABILITIES

Under the ADA, an actionable disability is an "impairment" that substantially limits a major life activity. 42 U.S.C. § 12102(2)(A). Here, the Ninth Circuit found a question of fact as to whether three "impairments" (impotence, occasional insomnia, and inability to get along with others) substantially limit McAlindin's major life activities of sexual relations, sleeping, and interacting with others. The Ninth Circuit then concluded that there was an issue of fact as to whether the County reasonably accommodated these types of "impairments."

The Ninth Circuit's decision conflicts with the principles enunciated by the Fifth Circuit in *Taylor v. Principal*

Financial Group, Inc., 93 F.3d 155, 163 (5th Cir. 1996) ("*Taylor*") and *Burch v. Coca-Cola Co.*, 119 F.3d 305, 314 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998) ("*Burch*"). These decisions hold that a reasonable accommodation claim must involve an impairment that affects the employee's ability to perform his job duties, or the employer has *no duty to accommodate*. In other words, there must be a work-related nexus between the alleged impairments and the proposed accommodations.

Taylor holds that an actionable impairment must substantially limit a major life activity, but the analysis does not end there. *Taylor*, 93 F.3d at 163. *Taylor* clarifies that even if an employee is limited in a major life activity, the employer is not required to provide "reasonable accommodations" *unless the impairment limits the employee's ability to perform his work*. *Id.* at 164. As an illustration, the Fifth Circuit explains that a hearing-impaired assembly worker who suffers no job limitations as a result of her impairment may perform her work without accommodations. *Id.* However, a hearing-impaired telephone operator may not be able to perform her job unless she is provided with reasonable accommodations. *Id.*

Taylor emphasizes that an employer may not presume that a disabled employee is limited in his ability to work. *Id.* On the contrary, public policy dictates that the employer assume that a disabled employee is *not* limited in performing his work. *Id.* This presumption is supported both by the interpretive guidelines issued by the Equal Employment Opportunity Commission ("EEOC"), and by federal regulations, which direct employers to determine whether a disabled employee is limited *in his*

ability to work on a case-by-case basis. *Id. See also,* 29 C.F.R. Pt. 1630, App. § 1630.9 (1999).[3]

The Fifth Circuit's subsequent decision in *Burch* reiterates that the distinction between disabilities and limitations is "critical" because "[t]he ADA requires employers to reasonably accommodate *limitations,* not disabilities." *Burch,* 119 F.3d at 314, citing *Taylor,* 93 F.3d at 164. *Burch* explains that the existence of a disability "is material to a reasonable accommodation claim *only insofar as it limits an employee's ability to perform his or her job.*" *Id.* (emphasis added). As *Burch* points out, "[w]ithout such a showing, there would be nothing for the employer to accommodate." *Id.* at fn. 4.

Under these principles, McAlindin has the burden of demonstrating that his alleged impotence, occasional insomnia, and inability to get along with others limits his ability to perform the essential functions of his present

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[3] 29 C.F.R. Pt. 1630, App. § 1630.9 (1999), states in relevant part:

> "The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated."
>
> ***
>
> "[The accommodation process] requires the individual assessment of both the particular job at issue and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. . . . Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform."

position as a systems analyst. *Id.* It is obvious that McAlindin is able to perform the essential functions of a systems analyst position. First, McAlindin has continued to perform these functions throughout six years of litigation. App. 8. Moreover, McAlindin affirmatively claims to be qualified to perform the functions of a systems analyst. In fact, as an "accommodation" of his alleged impairments, McAlindin seeks a transfer to the same position – a systems analyst position – but in a different department. App. 6, 51.

The Ninth Circuit's decision does not address how a transfer, or any other accommodation, could "assist" McAlindin in performing the duties of a systems analyst, where McAlindin *does not claim to be limited* in performing these duties. It is inconceivable that there is work-related "accommodation" for McAlindin's impotence. App. 28. (Trott, J., dissenting.) Assuming insomnia might require accommodation under some circumstances, McAlindin does not allege that drowsiness limits his ability to perform the duties of a systems analyst. App. 6.[4] Although

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[4] It is doubtful whether McAlindin's occasional insomnia constitutes a disability at all, much less one that limits McAlindin's ability to perform the essential functions of his job. A person is disabled under the ADA if "substantially limited" by an impairment, meaning he cannot perform, or is significantly restricted in performing, an activity that an average person can perform. 29 C.F.R. § 1630.2(j)(1) (1995). In his declaration opposing summary judgment, McAlindin states that he "experiences problems with sleeping" despite taking medication. (App. 4-5.) Sleep difficulties, unless severe, do not substantially limit the major life activity of sleeping. *See, e.g., Pack v. Kmart Corp.*, 166 F.3d 1300, 1305-06 (10th Cir. 1999) (finding that employee's insomnia was controlled with

the court suggests that McAlindin's "inability to get along with others" might in itself warrant a transfer, this suggestion conflicts with decisions of other circuits, as discussed below.

II

THE DECISION HERE CONFLICTS WITH DECISIONS OF VARIOUS OTHER CIRCUITS, WHICH HOLD THAT A TRANSFER IS NOT A "REASONABLE ACCOMMODATION" WHERE IT IS BASED ON STRESS ALLEGEDLY CAUSED BY CO-WORKERS, OR WHERE THE EMPLOYEE CAN BE ACCOMMODATED IN HIS PRESENT POSITION

While McAlindin was out on stress-related disability leave, he repeatedly requested a transfer to a systems analyst position in another department, because of his "negative associations" with his coworkers. App. 5-6. The County declined to transfer McAlindin, advising that it would explore ways of accommodating McAlindin in his present position when he returned. App. 6. Upon his return, McAlindin's anxiety disorder was controlled by medication. App. 16-17. However, McAlindin continued to request a transfer because he felt his supervisors were "retaliating" against him. App. 6-7, 22-23. He complained that a supervisor issued a written warning when colleagues observed McAlindin sleeping at work, and

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medication, holding that employee failed to show impairment was substantially limiting) and *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 644 (2nd Cir. 1998) (finding that difficulty sleeping is a widespread problem, holding that employee failed to show affliction was substantially limiting).

rejected McAlindin's request for offsite computer training because such training is provided on-site. App. 22-23.

Although the Ninth Circuit found that McAlindin failed to state a retaliation claim, it found that these allegations were sufficient to create a question of fact as to whether the County reasonably accommodated McAlindin's drowsiness, his request for training, or his request for a transfer. App. 19-20. As discussed above, the County need not accommodate McAlindin's requests because McAlindin's alleged impairments do not limit his ability to perform his job. Further, the Ninth Circuit's finding regarding the requested transfer creates a conflict among the circuits.

A. A Transfer Based on Stress Allegedly Caused by Co-Workers is Unreasonable As a Matter of Law.

The Ninth Circuit's reasoning is contrary to the holding of the Third Circuit Court of Appeals in *Gaul v. Lucent Technologies*, 134 F.3d 576, 581 (3d Cir. 1998). The employee in *Gaul*, like McAlindin, had a history of anxiety-related disorders that were treated by medication and therapy. *Id.* at 577. The employee in *Gaul*, like McAlindin, suffered a relapse after a promotion. *Id.* Finally, the employee in *Gaul*, like McAlindin, sought a transfer because of "inordinate stress" resulting from his inability to get along with coworkers. *Id.* at 579. The issue decided by the Third Circuit was whether the employee's "request to be transferred away from individuals causing him prolonged and inordinate stress was unreasonable as a matter of law under the ADA." *Id.*

The Third Circuit concluded that such an accommodation was unreasonable for a wide variety of practical and legal reasons. *Id.* First, the court found that such an accommodation would place "a wholly impractical obligation" on the employer. *Id.* at 581. The employer "could never achieve more than temporary compliance because compliance would depend entirely on [the employee's] stress level at any given moment. This would in turn depend upon an infinite number of variables, few of which [the employer] controls." *Id.* Further, an employer would have a duty to transfer an employee whenever he was "stressed out" by a co-worker or supervisor; and it would be "difficult to imagine a more amorphous 'standard' to impose on an employer." *Id.* The court concluded that this vague standard would be "subject to tremendous abuse." *Id.*

Second, the court found that the proposed accommodation would impose "extraordinary administrative burdens" on an employer, which would have to consider stress levels in making assignments. *Id.* Finally, the court found that requiring an employer to transfer an employee on such grounds would be tantamount to establishing the employee's "conditions of employment." *Id.* (citation omitted).

For these reasons, the Third Circuit held that the employee had not met the second prong of a reasonable accommodation claim, i.e., that he was qualified to perform the essential functions of his job, with or without reasonable accommodations. *Id.* The employee was therefore not a "qualified individual with a disability" under the ADA, and the employer had no duty to investigate other reasonable accommodations. *Id.*

The Third Circuit's holding in *Gaul* has been cited with approval by the Eighth Circuit in *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681, 689 (8th Cir. 1998) (finding that employee made no connection between proposed transfer and his disabilities, and noting that it was unlikely that such an accommodation would be reasonable under *Gaul*); *see also, Olson v. Dubuque Community School Dist.*, 137 F.3d 609, 612-13 (8th Cir. 1998) (finding that the employee's depression did not constitute a disability requiring accommodation; concurring opinion states that the requested transfer was not required under *Gaul*.)

This Court should grant review to consider the important issue of whether employers bear a duty to transfer an employee whenever he or she is "stressed out" by coworkers. This issue implicitly requires the Court to determine whether the ADA intended to restrict an employer's discretion on personnel issues, i.e., deciding with whom an employee will work. As the Third Circuit pointed out in *Gaul*, nothing in the ADA itself indicates that Congress intended to interfere with these types of personnel decisions. *Gaul*, 134 F.3d at 581. The need for guidance is further underscored by the potential for abuse noted by the court in *Gaul*. *Id.*

Unfortunately, cases from various federal jurisdictions suggest that the situation presented in the instant case has become increasingly common for employers.[5] An

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[5] In addition to the cases cited above, *see, e.g., Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999); *Wernick v. Federal Reserve Bank*, 91 F.3d 379 (2d Cir. 1996); *Weiler v. Household Finance Corp.*, 101 F.3d 519 (2d Cir. 1996); *Mancini v. General Electric Co.*, 820 F.Supp. 141 (D. Vt. 1993).

unhappy employee asserts a disability and demands a transfer or reassignment from the employer to "accommodate" the alleged disability. As the dissent in this case opined, the majority opinion *encourages* employees to assert such claims. The dissenting opinion points out that "the majority claims for McAlindin a disability – 'interacting with others' – that he does not claim for himself." The majority then decides this "explosive issue" without adequate consideration. As a result, "not only do we serendipitously create a Pandora's box, but we then open it with a flourish and invite into federal court all but the 'cantankerous' to sue those employers with whom they cannot get along." App. 27 (emphasis omitted).

B. Transfer or Reassignment is a Reasonable Accommodation Only When An Employee Cannot Be Accommodated in His Present Position.

The Ninth Circuit's decision in this case is also inconsistent with the decisions of numerous circuits, which hold that an employer is not obligated to accommodate an employee by transferring him to a *new* position unless he cannot be reasonably accommodated in his *present* position. *See Smith v. Midland Brake, Inc*, 180 F.3d 1154, 1170-71 (10th Cir. 1999) (holding that reassignment is an option to be considered only after other efforts at accommodation have failed, citing *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1301 (D.C.Cir. 1998)); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496-98 (7th Cir. 1996) (following EEOC interpretive guidance that reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir.

1998) (holding that generally, transfer or reassignment of an employee is only considered when accommodation within the individual's current position would pose an undue hardship); *see also, Vollmert v. Wisconsin Department of Transportation*, 197 F.3d 293, 302 (7th Cir. 1999) (holding transfer improper because it did not address the limitations imposed by the employee's disability).

The published opinion here is not only inconsistent with these decisions, but with the legislative history of the ADA. The history shows that reassignment is to be considered when an employee cannot be accommodated in his present position, rather than when an employee is no longer happy with that present position.[6] The opinion is also inconsistent with the EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o) (1998), which provides that,

> Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered

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[6] The legislative history of the ADA states in relevant part:

> "Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that he or she has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker. Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered." H.R. Rep. No. 485(II), 101st Cong., 2d Sess at 63 (1990), *reprinted in* 1990 U.S.C.C.&A.N. 267, 345.

> *only when* accommodations within the individual's current position would pose an undue hardship (emphasis added).

The message delivered by this guideline is that the employer must first "determine that no reasonable accommodation could be made to keep the disabled employee in his present position. *Only then* should the employer move to the alternative accommodation of reassignment." *Smith*, 180 F.3d at 1166 (emphasis added). The Ninth Circuit's opinion in this case disregards the EEOC guidelines, the case law interpreting these guidelines, and the legislative history of the ADA, all of which conclude that a transfer is reasonable only when accommodations are needed, but cannot be provided in the current position.

CONCLUSION

Congress enacted the ADA in 1990 to protect otherwise qualified individuals from employment discrimination based on a disability. *Gaul*, 134 F.3d at 581 (citation omitted). But Congress did not intend to create a right to "accommodations" where an employee can perform the essential functions of his job, as is the case here. The Ninth Circuit's published decision to the contrary conflicts with decisions of other circuits in this important

area of employment law. For this reason, the County respectfully submits that certiorari is appropriate.

DATED: April 17, 2000

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD MCALINDIN, *Plaintiff-Appellant,* v. COUNTY OF SAN DIEGO; RUDOLPH TAMAYO; EDWARD BAKER; GABRIEL RODRIGUEZ; DOES, one through 50, inclusive, *Defendants-Appellees.*	No. 97-56787 D.C. No. CV-94-01453-JTM/RBB ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted
June 10, 1999 – Pasadena, California

Filed September 16, 1999
Amended January 18, 2000

Before: Dorothy W. Nelson, Stephen Reinhardt,
and Stephen S. Trott, Circuit Judges.

Opinion by Judge D.W. Nelson; Partial Concurrence
and Partial Dissent by Judge Trott

COUNSEL

Dennis M. Grady, Grady & Associates, San Diego, California, for the plaintiff-appellant.

Lloyd M. Harmon and William H. Songer, Office of the County Counsel, San Diego, California, for the defendants-appellees.

ORDER

The opinion filed September 16, 1999 is hereby amended as follows:

At Slip Op. 11836, headnote [13], lines 11-16, delete "Thus, the sleep disorder and sexual dysfunction merely help to establish that the impairment (panic disorder after treatment) affects a major life activity; they are not relevant to the reasonable accommodation discussion, however, which focuses on the post-treatment panic disorder's manifestations in the workplace and the employer's response to them".

At Slip Op. 11836, headnote [13], lines 21-24, replace "The two inquiries become related only to the extent that the disability may impact the employer's ability to craft a reasonable accommodation for the employee" with "The two inquiries – namely, whether McAlindin is disabled and what constitutes reasonable accommodation for that disability – only intersect to the extent that McAlindin's disability manifests itself in the workplace".

Judge D.W. Nelson voted to deny the petition for rehearing and recommended rejection of the suggestion for rehearing en banc. Judge Reinhardt voted to deny the petition for rehearing and to reject the suggestion for

rehearing en banc. Judge Trott voted to grant the petition for rehearing and to grant the suggestion for rehearing en banc. The full court was advised of the suggestion for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

D.W. NELSON, Circuit Judge:

OVERVIEW

Richard McAlindin, who has been diagnosed as suffering from anxiety disorders, panic disorders, and somatoform disorders,[1] appeals the district court's grant of summary judgment on his Americans with Disabilities Act ("ADA") claim. McAlindin also appeals the district court's grant of summary judgment on his claim that the County of San Diego ("the County") retaliated against him for asserting his rights under the ADA. We hold that sleeping, engaging in sexual relations, and interacting with others are "major life activities" under the ADA,

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[1] A somatoform disorder is a "condition marked by the presence of symptoms suggesting a physical disease but without physical changes or physiological mechanisms that might account for the symptoms. In addition, there must be evidence, or a strong suggestion, that the symptoms have a psychogenic or psychologic origin." J.E. Schmidt, 5 *Attorney's Dictionary of Medicine and Word Finder* at S-206 (1999).

and that McAlindin has raised a triable issue as to whether he is substantially limited in a major life activity. We reverse the grant of summary judgment on the ADA claim and remand for further proceedings. However, we affirm the district court's grant of summary judgment on the retaliation claim.

FACTUAL AND PROCEDURAL BACKGROUND[2]

McAlindin began working for the County's Housing and Community Development Department as a systems analyst in September 1983. Several doctors have concluded that McAlindin suffers from anxiety disorders, panic disorders, and somatoform disorders. He has received treatment, including psychotherapy and a number of medications, such as Xanax, Buspar, and Paxil. McAlindin explained his condition in his declaration, which stated the following:

> I have been diagnosed with anxiety disorders, including panic disorders and somatoform disorders. . . . Despite the medications [I take], I continue to experience symptoms so severe that at least once a month, I am completely incapacitated, and forced to lie down. Symptoms include dizziness, lightheadedness, narrowed vision, and strange sensations in my head, and my arms and legs. As a result of the medications, I experience impotence. In addition, since 1989, I have frequently been unable to sleep and have had severe insomnia. The medication has helped with this, but I still experience problems with

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[2] We recite the facts in the light most favorable to McAlindin, the non-moving party.

> sleeping. Without the medication, my symptoms return. If I do not take my medication, I am unable to function. The frequency and severity of the symptoms increases to the point where I cannot take care of myself. My condition interferes with my ability to see and hear and speak. The sense of anxiety, without medication, is so overwhelming, that I am unable to do anything. I am essentially "paralyzed."

McAlindin received a "provisional promotion" in early 1989, which brought new, very stressful duties. In June 1989, McAlindin complained about a vendor's misconduct, yet his supervisors disregarded his complaints. According to McAlindin's supervisor, McAlindin became agitated and started shouting in an accusatory manner during the meeting. Soon thereafter, McAlindin sought and was granted leave due to "work stress." He obtained workers compensation for the stress.

In May 1992, McAlindin again took leave for stress-related disability. He submitted medical documents from his physician requesting that his leave be extended, and the County complied. When it became clear that McAlindin's leave would extend beyond a year, the County informed his attorney that his status would no longer be designated as "leave without pay with right to return." Pursuant to the County's regulations, individuals may not remain on disability leave "with right to return" for more than a year.

During McAlindin's leave, he repeatedly requested through his attorney a transfer to a different job as a "reasonable accommodation" required by the ADA. McAlindin explained that several of his doctors had

advised that he not return to his previous work setting because the negative associations there would impede his recovery. The County responded by offering to place his name on the transfer list but made it clear that it would not make any special efforts to ensure a transfer. In addition, the County said that it preferred to explore ways of accommodating McAlindin in his present position. Based on his familiarity with the County, McAlindin states that "there are a number of positions for systems analysts [in other departments] and that vacancies occur with some frequency, because of transfers, and attrition." The County does not dispute this. The County maintains an unranked transfer list, which departments can utilize if they wish when they have vacancies. The County's policy is to require employees to arrange their own transfers.

In July 1993, the County required McAlindin to undergo an examination by a County-retained psychiatrist to evaluate his ability to return to work. Dr. Reiss confirmed the diagnosis of anxiety and panic disorders. Dr. Reiss also found that McAlindin required more aggressive medications and psychotherapy in order to return to his position. Dr. Reiss concluded that, with the proper treatment, McAlindin could return to his job in three to six weeks. After receiving Dr. Reiss' evaluation, the County told McAlindin that he had to obtain the required treatment and return to his job within two months, or else he would lose any likelihood of working for the County again.

When he returned from his second disability leave, McAlindin felt that the way he was treated by his supervisors changed drastically. McAlindin was given a

written warning by his supervisor for sleeping at work, although he informed his supervisor that his doctor had prescribed medications that made him drowsy. McAlindin also complained about not receiving adequate training to help him adapt to the changing technologies in the department when he returned from his leave of a year and a half. McAlindin alleged that the other systems analyst in his department, Floyd Garrett, had been sent to off-site training, which McAlindin had been denied. Garrett countered that he had not received off-site training and had been trained exclusively through an on-site computer tutorial and on-the-job-training. County officials testified that the County relies almost exclusively on the computer tutorial for training.

McAlindin sued the County and his supervisors for disability discrimination in violation of the ADA, 42 U.S.C. § 12101 *et seq.*, and the California Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code § 12940 *et seq.*, and for age discrimination and retaliation under FEHA. On December 5, 1995, the district court granted in part and denied in part the County's motion for summary judgment. The court granted summary judgment on McAlindin's disability claim, holding that he lacked a "disability" within the meaning of the ADA. The court also dismissed McAlindin's state law claims for age and disability discrimination, from which McAlindin does not appeal. The district court expressed doubt that most of McAlindin's retaliation allegations could survive summary judgment. Nonetheless, because McAlindin asked to amend his complaint to add new factual allegations of retaliation regarding a recent suspension, the district court denied summary judgment on the retaliation claim.

On September 12, 1997, the district court granted summary judgment on most of the alleged instances of retaliation discussed in the 1995 order: (a) the denial of a transfer; (b) the revocation of McAlindin's "right to return;" (c) the County's requirement that McAlindin return to his former job; (d) the failure to provide necessary training; (e) the written warning for sleeping; and (f) general harassment/failure to accommodate.

Regarding McAlindin's remaining retaliation allegations, however, the district court denied summary judgment. The court found that there were factual disputes regarding a suspension and some negative evaluations that McAlindin received. Although McAlindin could have gone to trial on these issues, he chose to dismiss this part of his retaliation claim. On September 29, 1997, the district court entered final judgment, permitting McAlindin to appeal the grant of summary judgment on his disability and retaliation claims. McAlindin timely appealed. At the time of oral argument, McAlindin remained employed by the County in his same job.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *See Bradley v. Harcourt Brace and Co.*, 104 F.3d 267, 269 (9th Cir. 1996) (citing *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996)). "We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

DISCUSSION

I. DISABILITY.

A. Major life activities

The ADA, which prohibits discrimination against a "qualified individual with a disability," 42 U.S.C. § 12112(a), defines "disability" in part as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." *Id.* § 12102(2)(A).[3] In enacting the ADA, Congress chose to protect individuals who have mental impairments as well as those with physical impairments. *See Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir. 1998); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 365 n.3 (9th Cir. 1996); 29 C.F.R. § 1630.2(h)(2) (listing "emotional or mental illness" as an impairment). To be disabled under this definition, therefore, McAlindin must show an impairment that affects one or more major life activities. *See* 42 U.S.C. § 12112(a) (West Supp. 1999).

Although the district court accepted McAlindin's claim that his anxiety disorder constituted an impairment, it determined that McAlindin was not substantially limited in any major life activities.[4] The district court

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[3] The definition of disability also encompasses those who have a "record of such an impairment" or are "regarded as having such an impairment." 42 U.S.C. § 12102(2). Because we reverse the grant of summary judgment based on McAlindin's claim that he is actually disabled, we do not address whether he falls within these alternative definitions of disability.

[4] The County has not disputed that McAlindin meets the other statutory requirements of (1) having an "impairment" and (2) being a "qualified individual," meaning he can perform the "essential functions" of his job. 42 U.S.C. § 12111(8).

summarily dismissed most of McAlindin's asserted major life activities and focused on the major life activity of working.[5] We thus analyze major life activities here in order to establish whether in addition to being impaired, McAlindin raises a genuine issue of material fact as to whether he is disabled for the purposes of the ADA.

According to the EEOC, major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 1630.2(i).[6] "[T]he first question is whether an individual is substantially limited in a major life activity other than working (e.g., sleeping, concentrating, caring for oneself)." Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on*

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[5] We note that thirteen medical professionals examined McAlindin over a period of years, and all (even those retained by the government) concluded that McAlindin has a mental impairment. Four specifically recommended that McAlindin did not return to his previous work setting because it would exacerbate his condition. Many discussed McAlindin's condition in some depth.

[6] The Supreme Court recently called into question whether the EEOC has the authority to issue regulations implementing the ADA. *See Sutton v. United Air Lines, Inc.*, ___ U.S. ___, 119 S. Ct. 2139, 1245-46 [sic] (1999). *But see id.* at 2161-62 (Breyer, J., dissenting) (arguing that the EEOC has this authority). The Court, however, ultimately declined to resolve this issue. *See id.* at 2546; *see also Murphy v. United Parcel Serv., Inc.*, ___ U.S. ___, 119 S. Ct. 2133, 2138 (1999) (assuming that EEOC regulations are valid and applying them). Because the Supreme Court has not resolved this issue and the parties in the present case have not raised it, we continue to look to the EEOC regulations and interpretive commentary for guidance.

the Americans with Disabilities Act and Psychiatric Disabilities 3 (March 25, 1997) [hereinafter *EEOC on Psychiatric Disabilities*]. We conclude that the other activities – specifically, sleeping, engaging in sexual relations, and interacting with others – asserted by McAlindin are "major life activities" within the meaning of the ADA, and thus we need not address the district court's conclusion that he was not substantially limited in his ability to work. *See Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142, 152 (3d Cir. 1999). Whether McAlindin faced substantial limitations in his ability to work is irrelevant to whether his limitations in other major life activities qualify him as disabled for ADA purposes.

The ADA does not define "major life activity." *See Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998). However, "the plain meaning of the word major denotes comparative importance and suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Id.* (internal quotation marks omitted). The *Bragdon* Court noted that the term "major life activity" is very broad and includes activities that are private in character. *See id.* (rejecting attempt to confine major life activities to "those with a public, economic, or daily aspect"). A major life activity also must be "a basic activity that the average person in the general population can perform with little or no difficulty." *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999). All of the major life activities that are relevant here – engaging in sexual relations, sleeping, and interacting with others – meet this requirement for the purposes of surviving disposition on summary judgment. The district court gave no reason why these activities are not significant in the life

of the average person, like walking, speaking, and learning.

1. Sexual Relations

In *Bragdon*, which was decided after the district court granted summary judgment, the Supreme Court strongly implied that engaging in sexual relations, like reproduction, is a major life activity. *See* 118 S. Ct. at 2205 (holding that "[r]eproduction falls well within the phrase 'major life activity' " because "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself"). Other courts have reached the same conclusion. *See, e.g., Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 775 n.24 (E.D. Tex. 1996) (AIDS impairs the major life activity of "engag[ing] in intimate sexual relationships"); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D. D.C. 1992) ("sexual contact" is a major life activity under the Rehabilitation Act, the ADA's precursor).

We conclude that engaging in sexual relations, just like procreation, is a major life activity. The number of people who engage in sexual relations is plainly larger than the number who choose to have children. Moreover, according to the reasoning employed by the Fifth Circuit with respect to working as a major life activity, sexuality is important in how "we define ourselves and how we are perceived by others" and is a fundamental part of how we bond in intimate relationships. *EEOC v. R.J. Gallagher Co.*, 1999 WL 499571, at *7 (5th Cir. July 15, 1999).[7]

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[7] In *Runnebaum v. Nationsbank*, 123 F.3d 156, 170-71 (4th Cir. 1997) (en banc), the Fourth Circuit expressed doubt over

2. *Sleeping*

Common sense suggests that sleeping is also a major activity in the lives of most people. A person who gets the recommended eight hours of sleep a day spends one-third of each 24-hour day sleeping. Moreover, sleeping is indispensable to the maintenance of personal health. Therefore, we join the Second and Tenth Circuits in holding that sleeping is a major life activity. *See Pack*, 166 F.3d at 1305; *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 643 (2d Cir. 1998); *see also Criado*, 145 F.3d at 442 (suggesting that sleep is a major life activity).

3. *Interacting with Others*

The record indicates that McAlindin may be limited in a third major life activity, interacting with others. Because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of "major life activity." *See Criado*, 145 F.3d at 442 (plaintiff's mental impairment "substantially limited her ability to work, sleep, and relate to others"); *Sherback v. Wright Automotive Group*, 987 F. Supp. 433, 438 (W.D. Pa. 1997); *EEOC on Psychiatric Disabilities* at 3. A court in another circuit, however, suggested that the "ability to get along with others" was too vague to be a major life activity, yet assumed that it was a major life

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whether engaging in sexual relations is a major life activity, yet assumed that it was. The court provided no reasoning to support its skepticism. We think the Supreme Court's analysis in *Bragdon* resolved the doubt raised by the *Runnebaum* court.

activity for the purposes of its decision. *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997).[8]

We see nothing in the statutory text that makes vagueness the test for determining what is a major life activity. We do not think that any vagueness in the term rises to the level of making it unworkable as a major life activity. In any event, interacting with others is no more vague than "caring for oneself," which has been widely recognized as a major life activity. *See, e.g., Bragdon*, 118 S. Ct. at 2205 (citing 45 C.F.R. § 84.3(j)(2)(ii)); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998); *see also Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (defining caring for oneself as including everything from driving and grooming to feeding oneself and cleaning one's home).

Recognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity. Mere trouble getting along with coworkers is not sufficient to show a substantial limitation. *See EEOC on Psychiatric Disabilities* at 5. Here, there are clinical findings indicating that one of the effects of McAlindin's mental illness is a pattern of withdrawal from public places and family members.

In addition, the limitation must be severe or, in other words, substantial when compared to the ability of "the

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[8] The court acknowledged that "a more narrowly defined concept going to essential attributes of human communication could, in a particular setting, be understood to be a major life activity." *Soileau*, 105 F.3d at 15.

average person in the general population." 29 C.F.R. § 1630.2(j)(1)(i); *see also id.* § 1630.2(j)(2)(i) (courts must consider the "severity" of the impairment). We hold that a plaintiff must show that his "relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." *EEOC on Psychiatric Disabilities* at 5.

4. McAlindin's Evidence of Impairment

The medical evidence in the record demonstrates a genuine issue of material fact as to whether McAlindin is substantially limited in these three activities. First, McAlindin stated in his declaration that he is impotent as a result of the medications he must take. There appears to be no other record evidence regarding his ability to engage in sexual relations. McAlindin's statement is sufficient to raise a genuine issue of material fact.

Second, McAlindin stated in his declaration that he had experienced great difficulty sleeping at night. In addition, as his doctor explained in a letter to his supervisor, McAlindin's numerous medications disrupted his normal sleep patterns and caused him to be drowsy at work. Although the record indicates that the sleep medication has helped McAlindin's ability to rest at night somewhat, his declaration states that his difficulty sleeping has persisted to some extent. This evidence raises a genuine issue of material fact regarding McAlindin's sleeping.

Third, several of the doctors who evaluated McAlindin documented his difficulty interacting with others. A

review of the various medical evaluations indicates that, following his panic attack in 1992, McAlindin became increasingly withdrawn and his ability to deal with people and stress was seriously diminished. For instance, Dr. Sandweiss concluded that McAlindin "is *anxious all of the time*. . . . He has a fear reaction and feels that he has to constrict outside activities and stay away from crowds, shopping centers and any disagreement with his wife. He's around the house most of the time, at least 20 hours per day. . . . " (emphasis in original). Dr. Reiss likewise noted that McAlindin was barely functional, "avoid[ing] activities, for fear that they will make him feel more anxious" and stated that anxiety had a paralyzing effect on him. Consequently, "[McAlindin's] social activities are confined to his family. He is not involved in any groups or political or religious affiliations."

These evaluations suggest that McAlindin suffers from a total inability to communicate at times, in addition to a more subtle impairment in engaging in meaningful discussion. His alleged "fear reaction" and "communicative paralysis" are sufficiently severe to raise a genuine issue of material fact about his ability to interact with others. Therefore, summary judgment would be inappropriate on this issue.

Finally, we note that an intervening Supreme Court decision alters the standard by which we view McAlindin's claim. In *Sutton*, the Supreme Court held that "the determination of whether an individual is disabled should be made with reference to measures . . . that mitigate the individual's impairment." 119 S. Ct. at 2143. The petitioners in *Sutton* claimed that they were disabled because of poor eyesight. With eyeglasses, their corrected

vision was "20/20 or better." *Id.* (internal quotation marks omitted). As a result, the Supreme Court affirmed the dismissal of their complaint for failure to state an ADA claim. *See id.*

The Supreme Court recognized, however, that in some cases the use of medication may not eradicate the effects of illness, and a disability may remain either due to symptoms of the condition itself which persist despite the effects of medication, or as a result of the medication's side-effects. *See Sutton,* 119 S. Ct. at 2149. In his declaration, McAlindin stated that he was describing how his condition affected him "[d]espite the medications." The record reflects the existence of a genuine issue of material fact as to whether even with medication and other treatment, McAlindin's mental impairment substantially limits his major life activities discussed above.[9] Thus, while the ultimate disability determination in this case may be more complex than in cases not involving mitigating treatment, the facts alleged by McAlindin, if true, bring his case within the category described in Sutton.

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[9] McAlindin produced evidence that he continued to be impaired despite medication with respect to at least two of the three of the major life activities in which he claims to experience difficulty: sexual relations and sleeping. Given that the Supreme Court's clarification came after the district court's determination, McAlindin also should be given the opportunity to demonstrate at trial that his inability to interact with others continues to persist despite the medication.

B. Reasonable Accommodation

Having established a genuine issue of material fact with respect to the existence of a disability, we turn to the issue of reasonable accommodation. The ADA definition of discrimination includes "not making reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). McAlindin alleges that the County denied him a "reasonable accommodation" in violation of the ADA when it failed to transfer him to another job, failed to give him necessary training, and disciplined him for sleeping that was caused by his medications.

Although the district court did not address whether McAlindin's requested accommodations were "reasonable," the County urges us to affirm on the ground that McAlindin's requested accommodations were unreasonable. *See United States v. Lewis County*, 175 F.3d 671, 679 (9th Cir. 1999) (citation omitted) (panel may affirm on any ground supported by the record). In its brief, the County repeatedly asserts that the fact that it treated McAlindin like all other employees means that it complied with the ADA.

However, the County misapprehends the ADA's requirement of reasonable accommodation. The issue is not whether McAlindin received the same treatment as everyone else did, but whether the employer took reasonable steps to accommodate his limitations in ways that

would not impose undue hardship on the County. *See* 42 U.S.C. § 12112(b)(5)(A) (West Supp. 1999). Here, the County does not present evidence that an undue hardship would result from transferring McAlindin, finding a way of accommodating his drowsiness due to the medication, or providing him with additional training outside of the office environment. Given this omission, we cannot conclude that those activities would have imposed an undue burden on the County. Indeed, the evidence suggests the contrary.

The essence of the concept of reasonable accommodation is that, in certain instances, employers must make special adjustments to their policies for individuals with disabilities. *See Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 334-35 (2d Cir. 1995) (rejecting argument that reasonable accommodation "requires only equal treatment"). The ADA places a "duty to accommodate" on employers in order to remove barriers that could impede the ability of qualified individuals with disabilities to perform their jobs. *Criado*, 145 F.3d at 445. Moreover, this is a " 'continuing' " duty that is " 'not exhausted by one effort'." *Id.* (quoting *Ralph v. Lucent Techs., Inc.*, 135 F.3d 166, 172 (1st Cir. 1998)).

In addition, we note that once McAlindin is viewed as disabled, the major life activities affected by the impairment are relevant only to the extent that they affect the type of accommodation that may be necessary and whether the employer has provided a reasonable accommodation. The existence of a genuine issue of material fact regarding disability and of one regarding reasonable

accommodation require separate inquiries. In the reasonable accommodation analysis, we focus on the impairment as relevant to the workplace and thus on whether the employer is making reasonable accommodations. *Cf. Bragdon v. Abbott*, 118 S. Ct. 2196, 2204-07 (1998) (discussing the ability to reproduce as the major life activity at issue with respect to HIV even though the discrimination involved refusal to provide medical care that was in no way connected to reproduction). The two inquiries – namely, whether McAlindin is disabled and what constitutes reasonable accommodation for that disability – only intersect to the extent that McAlindin's disability manifests itself in the workplace.

The fact that the County generally requires employees to arrange their own transfers or disciplines all employees who sleep at work thus does not end the inquiry. Instead, the issue is whether a particular accommodation would be burdensome to the employer. According to the statutory language, the presumption is that the accommodation is required "*unless* [the employer] can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

Consequently, we cannot affirm on the ground that McAlindin's requested accommodations are unreasonable because the County has presented no evidence indicating that arranging a transfer, for example, would impose an "undue hardship." The ADA specifically states that " 'reasonable accommodation' may include . . . job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position." *Id.* § 12111(9)(B).

This conclusion is reinforced by evidence suggesting that McAlindin's request was not unduly burdensome. McAlindin asserts that "vacancies occur with some frequency, because of transfers, and attrition." The County has not disputed this claim. It has not alleged an absence of available vacant positions that McAlindin can perform. Nor has it explained where McAlindin is on the transfer list or why, years after he brought suit, McAlindin has not been offered a transfer. There is no evidence that deviating from its transfer policy would create an "undue hardship" for the County.

On the contrary, it appears that transferring McAlindin due to his anxiety disorder would not unduly disrupt other employees' expectations because the County's transfer list is *unranked* and transfers are distributed in an ad hoc manner at the discretion of the hiring department. *Cf. Shapiro,* 51 F.3d at 336 (noting that "[t]he extent to which a 'reasonable accommodation' for a handicapped individual can burden or take away rights or privileges enjoyed by the non-handicapped persons is an important question of first impression"). Finally, whether a particular accommodation is reasonable often "turns on the facts of the case." *Criado,* 145 F.3d at 443. This is certainly not a case in which the facts clearly demonstrate an undue burden, thereby making summary judgment appropriate. Given the lack of evidence offered by the County and the relatively unburdensome nature of the requested accommodation, we find that McAlindin raised a triable issue of

fact. We thus reject the County's argument that we should affirm on this ground.[10]

II. RETALIATION.

In order to establish a prima facie case on his FEHA retaliation claim, McAlindin must demonstrate that (1) "he engaged in a protected activity," (2) "his employer subjected him to adverse employment action," and (3) "there is a causal link between the protected activity and the employer's action." *Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 868 (9th Cir. 1996) (quoting *Flait v. N. American Watch Corp.*, 3 Cal. App. 4th 467, 476 (Ct. App. 1992)). Next, the County is obligated to provide a legitimate, nondiscriminatory reason for its actions. *See id.* McAlindin then must respond with "specific, substantial evidence of pretext." *Bradley*, 104 F.3d 267 at 270 (internal quotation marks omitted). We affirm the district court's grant of summary judgment on the retaliation claim because McAlindin failed to establish a prima facie case.

The allegedly retaliatory conduct asserted by McAlindin and considered by the district court in its 1995 order[11] was the following: (1) his co-workers ignored

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[10] We also reject the County's contention that the EEOC commentary, 29 C.F.R. § 1630 (App.), precludes transferring McAlindin. Even if the County's erroneous construction of this commentary were correct, it would not control because it would conflict with the clear language of the statute, which permits job transfers. *See* 42 U.S.C. § 12111(9).

[11] In his briefs, McAlindin alludes to additional incidents of retaliation. Because McAlindin chose to dismiss the part of his

him; the County (2) failed to provide necessary training when he returned from disability leave; (3) failed to transfer him to a different job; (4) failed to extend his employment status as "leave without pay with right to return;" and (5) reprimanded him for sleeping on the job.

It is undisputed that by vigorously asserting his rights under the ADA, as well as other state and federal discrimination laws, McAlindin engaged in protected activity and established the first element of a prima facie case. The County claims, however, that McAlindin has not established the second element. Relying on cases from other circuits holding that an employer's conduct must constitute a demotion or be similarly severe, the County contends that McAlindin has not suffered an "adverse employment action." The County is correct that McAlindin's sense of isolation is not actionable. *See Strother*, 79 F.3d at 869 ("Mere ostracism in the workplace is not enough to show an adverse employment decision." (citation omitted)).[12] In addition, the County's refusal to extend McAlindin's "right to return" beyond a year, which was dictated by its leave policy, was not an adverse employment action. Given that the County permitted McAlindin to return to his job and informally assured him all along that it would respect his rights under the ADA, we see no harm that constituted an adverse action.

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retaliation claim that was based on these incidents in order to create appellate jurisdiction, we do not consider these incidents.

[12] We note that McAlindin has not presented evidence of any specific instances of harassment. He complains only of a very general sense of isolation in the workplace.

The remaining incidents, however, do qualify as adverse employment actions. We have previously rejected the County's argument that adverse actions must be severe. "[A plaintiff] need not show that she was fired, demoted, or suffered some financial loss. . . . " *Bouman v. Block*, 940 F.2d 1211, 1229 (9th Cir. 1991). In *Bouman*, we held that if a transfer to a "position was not made available to [plaintiff] because of her involvement in protected activities," then she suffered an adverse employment decision. *Id.*

Nonetheless, McAlindin's retaliation claim ultimately fails because he has not established the third element of a prima facie retaliation claim: that the adverse actions occurred *because of* his protected activities. *See Strother*, 79 F.3d at 868. The undisputed evidence shows that all of the adverse actions occurred because the County followed universally-applied policies, and not because McAlindin was targeted for unfavorable treatment on account of his protected activities. We address each of McAlindin's retaliation claims below. McAlindin was not targeted for unfavorable treatment because of his protected activities; to the contrary, he was treated like all other employees. Although the ADA imposes a different standard by virtue of the duty to make reasonable accommodations, *see supra*, under FEHA, McAlindin must show that he was targeted for adverse treatment.

McAlindin attempts to establish adverse treatment in four ways. First, McAlindin claims that the County denied him the opportunity to attend an off-site training seminar in the Natural computer language. The evidence indicates that the County expects its employees to learn Natural from a computer tutorial that they can use at

work. The only other Systems Analyst learned Natural exclusively through the tutorial and on-the-job training. The County's expectation that McAlindin do the same is not evidence of retaliation. McAlindin's only response is that a County employee's statement that the County "has been able to rely *almost exclusively* on [the tutorial] and project assignments for our analysts to become proficient in Natural," indicates that some analysts have received additional training. But even if that is the case, there is no evidence that the additional training included funding off-site seminars or that any such opportunities were distributed in a discriminatory manner. The possibility that some analyst may have attended a seminar at some point in time does not entitle McAlindin to do the same.

Second, the County's failure to arrange a transfer is not evidence of retaliation. The evidence shows that the County's policy is to place the onus for arranging transfers on individual employees and the departments to which they wish to transfer. In response to a letter from McAlindin's lawyer requesting a transfer, the County offered to place McAlindin on the transfer list just like any other employee and said that it would send him a transfer form.

Finally, McAlindin has offered no evidence to show that the County targeted him for retaliatory treatment by citing him for sleeping. The County policy forbids sleeping at work, and McAlindin's snoring apparently disrupted the work of his co-workers. McAlindin does not contend, in the part of his FEHA claim that is on appeal, that he was disciplined because of a disability in violation of the portion of the Act that proscribes discrimination; rather, he asserts, without any evidentiary support, that

he was disciplined in retaliation for his protests against the alleged discriminatory treatment. We affirm the district court's grant of summary judgment on the retaliation claim.

CONCLUSION

We therefore REVERSE the district court's grant of summary judgment on the ADA claim and AFFIRM the grant of summary judgment on the retaliation claim.

TROTT, Circuit Judge, concurring in part and dissenting in part:

Although I agree with the majority that McAlindin's retaliation claim fails as a matter of law, I respectfully disagree with the majority's conclusion that the rest of his case has any merit.

First, the majority claims for McAlindin a disability – "interacting with others" – that he does not claim for himself. Although the evidence strongly suggests that in fact he has a problem "interacting with others," McAlindin does not identify this plight as a mental or physical impairment that substantially limits one or more of his major life activities. Instead, McAlindin describes the disability upon which he grounds this lawsuit as a "generalized anxiety disorder or panic disorder," or an "anxiety/panic/somatoform disorder." At best, the suggestion that he cannot get along with others may be a *symptom* or a consequence of a disability, but not a disability per se.

Notwithstanding McAlindin's own description of his alleged disability, the majority inappropriately reaches out to plead for him a case he has not pleaded for himself. We have not had briefing or adequate argument on the tricky issue of whether "interacting with others" qua interacting with others could be a recognizable disability under this statute, yet we decide this non-issue anyway, warning everybody that simply being "cantankerous" – whatever the legal or scientific description of that is – won't be enough.

Ordinarily, we won't hear on appeal a past-posted claim not made in the district court, but here, we decide an explosive issue never discretely raised by McAlindin anywhere. Moreover, not only do we serendipitously create a mischievous Pandora's box, but we then open it with a flourish and invite into federal court all but the "cantankerous" to sue those employers with whom they *cannot* get along. Employers beware, now you may have an obligation at the risk of being sued to accommodate someone who does not possess the ability to "get along with others." Not only is this "disability" vague, but it's bizarre, ominous, and wholly outside of the group of serious disabilities Congress intended to cover with this statute. Does this opinion suggest that a person's foul temperament may no longer be a reason to deny that person a job?

Second, the doctors evaluating McAlindin do not paint a picture of a man with a cognizable disability. Dr. Sandweiss, a treating physician, calls his impairment "slight to moderate," and this opinion was rendered *before* he began his medication. Dr. Rabiner says McAlindin is able to work. Dr. Reiss says that McAlindin is not

disabled and requires no accommodation to return to work; and not one of the doctors claims that his condition is substantially limiting.

Third, I fail to see any causal connection whatsoever with McAlindin's alleged sexual disfunction and the job he wants, the job he has, or the adverse employment actions he alleges he suffered. Is the employer supposed to accommodate his impotence?

Fourth, McAlindin's proffered evidence fails utterly to show that he suffered an "adverse employment action." The defendants never denied him a transfer; they exercised their right to try keeping him in the same position first, remaining open to the idea that a transfer might be in order. Moreover, there does not appear to have been *any* consequences following the reprimand for sleeping when he was supposed to be working, a chastisement for which the employer can hardly be blamed. His request for accommodation seems to be a request that he be allowed to sleep when he is supposed to be working. Furthermore, the record reflects that McAlindin got the same training everyone else did; and the record is significantly devoid of information that he needed special training *due to his disability*. I would affirm on the ground that McAlindin, failed to go beyond mere allegations, and to demonstrate that he suffered an "adverse employment action." In addition, the employer proffered irrefutably appropriate reasons for everything it did.

McAlindin describes himself, in what amounts to a self-serving diagnosis, as "essentially paralyzed." He says that the medication does not solve his work problems because "at least once a month, I am completely

incapacitated and forced to lie down. The medication creates dizziness, lightheadedness, narrowed vision, and strange sensations in my head, and my arms and legs." If he is correct, I do not see how on earth such symptoms could be accommodated by his employer. McAlindin, who still works for the County, has never indicated how a transfer would help him perform the essential functions of the work he wishes to pursue, but more importantly, the employer did nothing to interfere with his right to transfer, telling him only that the request was "premature."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Richard McAlindin, Plaintiff, vs. County of San Diego, et al, Defendant.	CASE NO. 94cv1453 JM Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (Filed Sept. 12, 1997)

Defendant County of San Diego moves this court for summary judgment of plaintiff Richard McAlindin's claims. After careful consideration of all the pleadings, the court rules as follows:

BACKGROUND

PROCEDURAL HISTORY

Plaintiff Richard McAlindin, (plaintiff) a systems analyst employed by the County of San Diego, (defendant) filed a complaint on September 19, 1994, against the County and three individual supervisors alleging disability discrimination, age discrimination, and retaliation in violation of the Fair Employment and Housing act (FEHA) and the Americans with Disabilities Act (ADA). In 1994, plaintiff sued the same defendants in state court for the same violations. The Superior Court granted defendants' motion for summary judgment on the FEHA disability claim. On May 15, 1995, with defendants' stipulated approval, plaintiff filed a first amended complaint.

On December 6, 1995 Judge Keep granted the defendant's motion for summary judgment as to all claims except the retaliation claim under Cal Gov't Code § 12940. The court reasoned that the plaintiff had moved the court to amend his complaint to include a suspension he was serving at the time of the hearing and that additional information concerning the suspension could be grounds for an action for retaliation. The court thereupon denied the defendant's motion for summary judgment as to the plaintiff's fourth cause of action.

On February 23, 1996 the plaintiff filed a second amended complaint in this action. The complaint added a new retaliation claim under the ADA and included evidence regarding this new alleged incident of retaliation which plaintiff alleges he received a 60 day suspension. On April 7, 1997 the plaintiff filed a motion for leave to file a third amended complaint. Plaintiff did not allege further claims against the defendant but added factual allegations regarding ten more incidents to his claims of retaliation under the FEHA and the ADA. On July 14, 1997 this court granted plaintiff's motion for leave to file a third amended complaint. The defendant now moves for summary judgment on the retaliation claims under the FEHA and the ADA.

FACTUAL BACKGROUND

Plaintiff's lawsuit stems from his employment by the County Housing and Community Development ("HCD") office from 1984 to the present as a computer technician and "Associate Systems Analyst." In 1989, plaintiff was designated the "Project Leader" for a project by the HCD

and the County to upgrade their computer systems to use a computer language called NATURAL. In that same year, but after his appointment as "Project Leader," plaintiff took a one month leave of absence due to the "tremendous amount of pressure" plaintiff felt as Project Leader. During this one month absence, plaintiff's Project Leader tasks were reassigned to defendant Tamayo, who became plaintiff's supervisor. Upon his return to work, plaintiff continued in his regular responsibilities as a systems analyst.

In May 1992, plaintiff took a disability leave of absence that extended to November, 1993. During his disability leave and for some time after, the plaintiff filed several discrimination and retaliation claims against the defendant with the California Department of Fair employment and Housing and the Equal Employment Opportunity Commission. The plaintiff alleges in his third amended complaint that as a result of these claims against the defendant, the plaintiff suffered sixteen acts of retaliation while employed by the HCD. These sixteen acts form the basis of the plaintiff's claims for retaliation under the FEHA and ADA.

DISCUSSION

The plaintiff asks this court to reconsider all of the claims that the Judge Keep had previously addressed in her December 6, 1995 Order granting partial summary judgment. Defendant argues that the "law of the case" doctrine bars reconsideration of the claims previously ruled on by the court.

The court does not find that the "law of the case" doctrine is applicable in this matter, but will not reconsider or modify the December 6, 1995 partial summary judgment order. Although the plaintiff claims that the new interpretative guidelines under the ADA and the Social Security Administration ruling warrant a reconsideration of the court's previous order, the plaintiff fails to explain why such reconsideration is appropriate and fails to allege any new facts.[1]

Further, this court will not reconsider prior rulings on claims (a) through (f) in paragraph 33 of the plaintiff's complaint. Again, Judge Keep thoroughly considered the merits of these claims and found that none of these incidents were retaliatory. Summary judgment was denied solely to allow plaintiff to claim in a further amended complaint any new retaliatory incident. Plaintiff, again, has not articulated why these past claims should be reconsidered and, there being no good cause to do so this court declines to do so. Rather, the court adopts the reasoning of the December 6, 1995 order with respect to the allegations in paragraph 33(a) through (f) which concluded no genuine issue of fact existed as to the plaintiff's allegation of retaliation in these incidents.

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[1] Plaintiff's only reference to how the new guidelines affect the plaintiff's claims is with regard to the defendant's failure to provide additional training to plaintiff (see plaintiff's brief in opposition p. 17) The plaintiff argues that the new guidelines require that additional training can be a reasonable accommodation to disabled persons. However, the plaintiff fails to assert how these same guidelines alter his status as determined by the December 1995 order. The plaintiff does not explain how the guidelines now render him disabled.

Therefore, the only issue before the court is whether the incidents alleged in paragraph 33 (g) through (p) for retaliation under the FEHA and ADA can survive a summary judgment motion.

MOTION FOR SUMMARY JUDGMENT

A motion for summary judgment shall be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. den.*, 440 U.S. 981 (1979). Any doubt as to the existence of any issue of material fact requires denial of the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The opposing party cannot rest on the mere allegations or denials of [a] pleading, but must "go beyond the pleadings and by [his or] her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (citation omitted).

A genuine dispute will exist if the facts indicate "a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 254. In considering a summary judgment motion, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in the nonmovant's favor. *Id.* Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences are functions of the trier of fact. *Id.* at 255.

RETALIATION

As Judge Keep recognized in her December 6, 1995, order, retaliation claims are analyzed in a summary judgment context in the same manner as Title VII claims. First, the Plaintiff must establish a prima facie case for retaliation. *Flait v. North American Watch Corp.*, 3 Cal.App. 4th 467, 476 (1992) (citing *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1354 (9th Cir. 1984). In order to establish a prima facie case of retaliation a plaintiff must show that 1) he engaged in a protected activity 2) he was subjected to an adverse employment action, and 3) there was a causal link between the protected activity and the adverse action. *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). The causal link may be established "by an inference derived from circumstantial evidence such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." *Jordan v. Clark*, 847 F.2d 1368 (9th Cir. 1988) (quoting *Yartzoff* at 1376).

Once a prima facie case is established, the burden then shifts to the defendant "to articulate some legitimate, non-retaliatory reason for the adverse action." *Id.* The burden then shifts to the plaintiff who must prove that the reasons for the adverse actions were pretextual. *Id.*

Plaintiff's sixty day suspension (Plaintiff's complaint ¶33 (g)), the FSS project scope of work submission and related meetings (plaintiff's complaint ¶33 (h),(j),(k),(l),(m),(n) and (o)) and plaintiff's July 1996 performance appraisal (¶33 (i) plaintiff's complaint)

The court finds that competent evidence exists from which a trier of fact could reasonably infer that the acts alleged in plaintiff's complaint ¶33 (g) through (o) were retaliatory. Specifically, as to ¶33(g), the court notes that subsequent claims were made by the plaintiff in August, 1993 after his first protected activity in April, 1993 whereby plaintiff complained of age discrimination to the California Department of Fair Employment and Housing, that plaintiff's attorneys complained throughout the period 1993 and 1994 of continued discrimination, that ongoing litigation occurred at the time of plaintiff's suspension and that the supervisor who suspended the plaintiff was aware of the plaintiff's previous complaints. Moreover, the incidents in ¶33(h) through (o), taken together may be inferred to be an adverse employment action culminating in an unsatisfactory performance appraisal and the September written warning to the plaintiff which remains in his file. There exist factual disputes concerning these alleged incidents, and, under certain circumstances of negative performance rating can constitute an adverse employment decision. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (subaverage performance rating found to be an adverse employment action). Thus, the court finds that there are questions of material fact as to whether the evaluation contained false statements. Therefore, the court denies the defendant's motion for summary judgment as to the retaliation claims under both the FEHA and ADA regarding the plaintiff's claims contained in ¶33 (g) through (o).

Plaintiff's claim regarding grievance procedures (¶33(p) of plaintiff's complaint)

Plaintiff claims that as early as 1989 the plaintiff asked the defendant if there was a grievance procedure which he could use to resolve work related complaints. The plaintiff asserts that he was not informed of the procedure until October 1996 and that the information was intentionally withheld. The defendant argues that failing to disclose publicly available information cannot be deemed an adverse employment action. The alleged failure by the defendant to notify the plaintiff of grievance procedures which are considered public information cannot be considered an adverse employment action. Moreover, the timing of the plaintiff's complaints and his requests for information preclude a causal connection between the two events. The court finds that no genuine issues of material fact exist as to plaintiff's claim the defendant failed to provide procedural information. Therefore, the court grants defendant's motion for summary judgment as to the retaliation claims under both the FEHA and ADA regarding the plaintiff's claim contained in ¶33(p).

CONCLUSION

The court declines to reconsider the issues previously addressed in Judge Keep's December 6, 1995 order. Instead, the court has considered the defendant's motion for summary judgment as to the plaintiff's claims for retaliation under the FEHA and the ADA. After a careful review of all the pleadings, the arguments of the parties and applicable law, the court **DENIES** defendant's

motion for summary judgment as to the FEHA and ADA retaliation claims regarding the incidents contained in plaintiff's complaint ¶33(g) through (o). The court **GRANTS** defendant's motion for summary judgment as to the FEHA and ADA retaliation claims regarding the incidents contained in plaintiff's complaint ¶33(p).

IT IS SO ORDERED.

DATED: September 10, 1997

/s/ Jeffrey T. Miller
JEFFREY T. MILLER
United States District Judge

cc: All Parties

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD McALINDIN, Plaintiff, v. COUNTY OF SAN DIEGO, RUDOLPH TAMAYO, EDWARD BAKER, GABRIEL, RODRIGUEZ, et al., Defendants.	Civil Case No. 94-1453-K (BTM) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT (Filed Dec. 5, 1995)

Defendants County of San Diego, Rudolph Tamayo, Edward Baker, and Gabriel Rodriguez bring this Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(c). Plaintiff Richard McAlindin opposes.

On December 4, 1995, the court heard oral argument on this motion, and took the motion under submission. Jeff Geraci represented Plaintiff at the hearing, and William H. Songer, Deputy County Counsel, represented Defendants.

Factual Background

Plaintiff Richard McAlindin, a current employee of the County of San Diego, filed the instant complaint against the County and three individual supervisors in federal court on September 19, 1994. He alleges various

types of discrimination. On May 15, 1995, with Defendants' stipulated approval, Plaintiff filed a First Amended Complaint.

He alleges he was discriminated against based on his disability (anxiety) and his age, and in retaliation for his prior discrimination complaints. He alleges disability discrimination under both the California Fair Employment and Housing Act ("FEHA") and the Americans with Disabilities act ("ADA"). He asserts his age and retaliation claims under FEHA.

In 1994, Plaintiff sued the same defendants in state court, raising the same claims he raises here for disability discrimination, age discrimination, and retaliation in violation of FEHA. The only new claim in the instant complaint is the disability discrimination claim brought under the ADA. The Superior Court granted Defendants' motion for summary judgment on the FEHA disability claim on March 10, 1995, and issued no ruling with respect to Plaintiff's other claims. Plaintiff then amended his original federal complaint to bring all three FEHA claims in this forum.

Plaintiff's lawsuit stems from his employment by the County Housing and Community Development ("HCD") office from 1984 to the present, as a computer technician in a position entitled "Associate Systems Analyst." In 1989, McAlindin was designated the "Project Leader" for the project by which HCD and the County were upgrading their computer systems to use a computer language called NATURAL. In that same year, but after his appointment as "Project Leader," Plaintiff took a one month leave of absence due to the "tremendous amount

of pressure" Plaintiff felt as Project Leader. Baker Decl. Exh. 3 (Plaintiff's Report of Occupational Injury or Illness). During this one month absence, Plaintiff's Project Leader tasks were reassigned to Defendant Tamayo, who became Plaintiff's supervisor. Upon his return to work, Plaintiff continued in his regular responsibilities as a systems analyst.

In May 1992, Plaintiff took a disability leave of absence that extended to November 1993. During Plaintiff's leave of absence, in late July 1993, the parties agreed that Plaintiff would be evaluated by a County-designated physician to assess whether he was capable of performing the essential functions of the position of Systems Analyst for HCD. On August 26, 1993, Plaintiff was examined by Dr. David Reiss, who issued a report on September 9, 1993, concluding that Plaintiff required no accommodation to return to his former position as a systems analyst with HCD and that his medical condition did not impair his ability to perform his usual work duties. Baker Decl. ¶ 28 and Exh. 23. After Dr. Reiss issued his report, the County wrote to Plaintiff's attorney advising him of the results of the evaluation and requesting that Plaintiff return to work at HCD on November 22, 1993, in his previous position. Baker Decl. ¶ 29.

In September 1994, Plaintiff filed this lawsuit, amending his complaint in May 1995. Defendants filed the instant motion for summary judgment on November 6, 1995. Plaintiff filed his Opposition on November 20, 1995. Defendants filed their Reply on November 27, 1995. On December 1, 1995, Plaintiff's counsel filed a declaration in support of Plaintiff's motion pursuant to Federal

Rule of Civil Procedure 56(f) to continue the summary judgment hearing.

The pre-trial conference in this case is January 8, 1996. However, in mid-November, after Plaintiff had received Defendants' moving papers for this motion, but before Plaintiff had filed an opposition to this motion, Plaintiff submitted an *ex parte* application for a Motion for Leave to Amend his complaint. The Court scheduled that motion for hearing on February 12, 1996. Plaintiff's amendment seeks to add another Defendant, and to assert additional factual allegations with respect to Plaintiff's retaliation claim.[1]

On November 29, 1995, a discovery conference was held before the Honorable Barry Ted Moskowitz, United States Magistrate Judge. At that conference, Judge Moskowitz ordered extension of discovery until December 15, 1995, "[o]n the issue of alleged recent retaliation by [Defendant] Baker." All other discovery in this case was to have been completed by November 3, 1995.

Discussion

Defendants move for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). The moving party to a motion for summary judgment has the initial burden of demonstrating that summary judgment is proper.

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[1] Plaintiff is currently serving a sixty-day suspension from work for allegedly accessing other workers' computer screens without authorization. Baker Supp. Decl. ¶¶ 5, 7, 8. Plaintiff appears to allege this suspension is additional evidence of retaliation against him by Defendants.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 149 (1970). The burden then shifts to the nonmoving party to show that summary judgment is not appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. *Id.* With respect to the specific facts offered by the nonmovant, the court does not make credibility determinations or weigh conflicting evidence and must draw all justifiable inferences in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Plaintiff alleges four causes of action. Plaintiff's first claim alleges disability discrimination in violation of the ADA. Plaintiff's second claim alleges disability discrimination in violation of FEHA. Plaintiff's third claim alleges age discrimination in violation of FEHA. Plaintiff's fourth claim alleges retaliation in violation of FEHA.

Plaintiff alleges he suffers from "anxiety disorder, also called generalized anxiety disorder or panic disorder," and alleges this condition is a disability within the meaning of the ADA. Compl. ¶ 13. Plaintiff alleges Defendants violated the ADA by refusing to accommodate his disability, citing four specific instances of alleged disability discrimination.

First, Plaintiff alleges that in May 1993, during a lengthy leave of absence because of his disability, he requested that he be permitted to return to work, but, as a "reasonable accommodation" of his disability, that he be transferred to a different County job. Plaintiff alleges the County failed to grant his request for a transfer, and thus

denied him "reasonable accommodation" of his disability. Compl. ¶ 14(a).

Second, Plaintiff alleges that as an accommodation of his disability, he requested the County extend his "leave without pay with right to return" status beyond one year, but that Defendants refused his request. Plaintiff alleges this refusal to extend his "leave without pay with right to return" status constitutes a violation of the ADA.

Third, Plaintiff alleges that upon his return to his job after the eighteen month leave of absence, he required training. Compl. ¶ 14(d). Rather than grant Plaintiff's request for training in the form of an out-of-town seminar, Defendants provided Plaintiff with the self-taught "Elite" tutorial program. Plaintiff alleges he has never received any training, and that the denial of his requests to attend an out-of-town training seminar at the County's expense violates "[t]he County's obligation to reasonably accommodate his disability." Compl. ¶ 14(d).

Fourth, Plaintiff alleges that when Defendants issued him a reprimand for sleeping on the job, Defendants violated the ADA. On two occasions, once in late 1993 and again in early 1994, Plaintiff's coworkers reported that Plaintiff was allegedly snoring at his desk during work hours. Plaintiff alleges that his disability requires him to take physician-prescribed medication, of which a side effect is drowsiness. Compl. ¶ 14(e). Plaintiff alleges the "written warning is unlawfully discriminatory" because "such sleeping or dozing is clearly a result of the medication [Plaintiff] is required to take." *Id.*

Plaintiff seeks damages for loss of earnings, deferred compensation, and employment benefits, compensatory

damages for humiliation, mental anguish, and emotional distress, and interest on earnings losses. Plaintiff also seeks punitive damages, a court order requiring his transfer to a different job, and costs and fees.

1. Claim 1: Disability Discrimination in Violation of the ADA

The ADA prohibits discrimination because of a person's disability against a "qualified individual with a disability." 42 U.S.C. § 12112(a). The statute defines a "qualified individual with a disability" as:

> [a]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8). The ADA defines discrimination under the statute to include:

> [n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . , unless such covered entity [i.e., employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. . . .

42 U.S.C. § 12112(b)(5)(A).

To establish a prima facie case of discrimination in violation of the ADA, a plaintiff must prove: (1) that he is a qualified individual with a disability; (2) that he has suffered an adverse employment action; and (3) that a causal connection exists between the adverse employment action and the disability. *Smith v. Upson County, Ga.*,

859 F. Supp. 1504, 1514 (M.D. Ga. 1994), *aff'd*, 56 F.3d 1392 (11th Cir. 1995). *See also Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442, 443 (E.D. La. 1994) ("To state a prima facie case under the ADA, plaintiff must prove that (1) he suffers from a 'disability'; (2) that he is a 'qualified individual'; and (3) that he suffered an adverse employment action because of his disability."). An employer who fails to provide reasonable accommodation to known physical or mental limitations of a qualified individual with a disability commits unlawful discrimination unless the accommodation can be shown to impose undue hardship. *Dutton v. Johnson County Bd. of County Comm'rs*, 859 F. Supp. 498, 506 (D. Kan. 1994).

Plaintiff has the burden to establish that he is "disabled" and "qualified" to perform the essential functions of the job either with or without reasonable accommodation. *Id.* at 504. The burden is then on the defendant to either rebut those claims or establish that the reasonable accommodation required would create an undue hardship. *Id.* at 505. In order to prevail on its summary judgment motion, the defendant must establish: (1) that plaintiff is not disabled within the meaning of the statute; (2) that plaintiff is not qualified to perform the essential functions of the job; or (3) that the only possible reasonable accommodations would create an undue hardship on defendant. *Id.*

Here, Defendants argue that Plaintiff is not disabled within the meaning of the ADA. The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities [of the disabled person]." 42 U.S.C. § 12102(2)(A).

Depression and other mental illnesses can qualify as disabilities for purposes of the ADA. *Stradley*, 869 F. Supp. at 443. However, mental or nervous disorders are not "impairments" for purposes of the ADA, unless they substantially limit one's ability to care for oneself, learn, work, go to school, see, hear, or walk. *Clark v. Virginia Bd. of Bar Examiners*, 861 F. Supp. 512, 516-17 (E.D. Va. 1994).

Defendants contend that Plaintiff's anxiety disorder does not constitute a "disability" under the ADA because, as Plaintiff testified in his deposition, Plaintiff retains the ability, even during a panic attack, to eat, walk, see, hear, breathe and care for himself. Songer Decl. Exh. 4 (48:5-20). However, Plaintiff asserts he is disabled under the statute because his condition affects his ability to sleep, perform sexually, and concentrate. Plaintiff alleges that his difficulty in concentrating makes him unable to work. Plaintiff presents no authority, and the Court knows of none, for the proposition that sleep and sexual performance constitute major life activities for purposes of the statute. Thus, the Court turns to Plaintiff's contention that he is disabled under the ADA because his condition substantially limits his ability to work.

Under the ADA, an individual is substantially limited in working if the impairment restricts the person's ability to perform either a class of jobs or a broad range of jobs in various classes. *Dutton*, 859 F. Supp. at 505. An impairment that limits an individual's ability to perform only one job fails the test of substantial limitation in working. *Id.*; *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Byrne v. Board of Education*, 979 F.2d 560, 565 (7th Cir. 1992); *Maulding v. Sullivan*, 961 F.2d 694, 698

(8th Cir. 1992), *cert. denied*, 113 S.Ct. 1255 (1993); *Daley v. Koch*, 892 F.2d 212, 214-16 (2d Cir. 1989).

The ADA regulations set forth six factors to be applied when determining whether an impairment substantially limits a major life activity. The first three factors "should be considered" when determining whether an impairment substantially limits a major life activity. 29 C.F.R § 1630.2(j)(2). The additional three factors "may be considered" when determining whether an impairment substantially limits the major life activity of working. 29 C.F.R § 1630.2(j)(3)(ii).[2]

The three factors that "should be considered" when determining whether an impairment substantially limits a

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[2] At oral argument, Plaintiff's counsel asserted that the EEOC Guidelines to 29 C.F.R. § 1630.2(j) state that if an individual has a disability for which the individual takes medication, the individual is presumptively disabled for purposes of the ADA, and the Court does not engage in an analysis of whether the individual's condition substantially limits a major life activity. Plaintiff's counsel provided no authority for this assertion and the Court knows of none.

Indeed, in his Opposition, Plaintiff contends he "[i]s 'substantially limited' in several 'major life activities.' " Plaintiff's Opp. at 6. Plaintiff then asserts that "[t]he determination of whether [Plaintiff] has a substantial limitation must be made without regard to the effect of his medication." Plaintiff's Opp. at 7. The Court agrees with the latter statement, and has conducted its analysis of Plaintiff's condition as it exists without medication. However, in the absence of authority to the contrary, the Court does not accept Plaintiff's contention that because Plaintiff takes medication for his condition, Plaintiff is presumptively disabled under the statute, and thus no analysis of whether his condition substantially limits a major life activity is necessary.

major life activity are: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2).

The three additional factors that "may be considered" when an individual claims substantial limitation in the major life activity of working are:

> (A) [t]he geographical area to which the individual has reasonable access;
> (B) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified (class of jobs); and/or
> (C) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii).

Plaintiff presents some evidence with regard to the first three factors, as do Defendants in the form of Plaintiff's deposition. In his deposition, Plaintiff testified that he is subject to "panic attacks," but that he "ha[s]'nt has too many" panic attacks in the past two years. Songer Decl. Exh. 4 (45-46). He states that the constant symptoms, such as headache or "buzzing" in the head, occur approximately one day per month. *Id.* at 47:3, McAlindin

Decl. ¶ 19. However, even during an attack, Plaintiff states that he retains the ability to eat, walk, see, hear, breathe and care for himself, Songer Decl. Exh. 4 (48:5-20), though during a full-blown panic attack, untempered by his daily medication, the condition "interferes with [his] ability to see and hear and speak." McAlindin Decl. ¶ 20. Plaintiff presents no argument in his Opposition that this interference substantially limits his ability to see, hear, and speak, and presents no evidence indicating a substantial limitation beyond the above statement.

Plaintiff has failed to produce any evidence relevant to any of the three latter factors that "may be considered" in evaluating whether an impairment substantially limits his employment potential. Specifically, Plaintiff presents no evidence showing a significant reduction in his ability to perform a class of jobs or a broad range of jobs in various classes. In fact, in Dr. Samuel H. Sandweiss' report, submitted by Plaintiff to oppose this motion, the doctor reports that "Mr. McAlindin would like to try to get back to a different county job doing the same kind of work." Geraci Decl. Exh. I (p.5). In addition, a review of the doctors' reports Plaintiff submitted with his Opposition reveals that though some, but not all, of the doctors Plaintiff has seen about his condition recommend he not return to his job, none states that Plaintiff's condition prohibits him from performing a class of jobs or a broad range of jobs in various classes.

Moreover, Plaintiff requests a transfer to a different County job, and maintains that such transfer will constitute a "reasonable accommodation" of his alleged disability. However, in his deposition, Plaintiff states that he

wanted a transfer to a department other than HCD or DIS because those departments were responsible for "the contractual problems" that occurred in 1989 when Plaintiff was Project Leader of the transition to NATURAL language. Songer Decl. Exh. 4 (59:13-28). Plaintiff makes no mention of his disability.

Plaintiff's request for a transfer indicates he believes he has the ability to work. He does not allege that his condition precludes him from working entirely. Rather, Plaintiff's current job appears to be the only job Plaintiff's disability precludes him from performing. That is insufficient under the statute for Plaintiff to maintain his ADA claim. *See Welsh*, 977 F.2d at 1419; *Byrne*, 979 F.2d at 565; *Maulding*, 961 F.2d at 698; *Daley*, 892 F.2d at 214-16; *Dutton*, 859 F.Supp. at 505.

Thus, the Court finds that Defendants have satisfied their initial burden of demonstrating that summary judgment is proper with respect to Plaintiff's ADA claim for disability discrimination. Plaintiff has not shown that there is a genuine issue for trial with respect to whether his condition constitutes a disability under the statute. The only "major life activity" Plaintiff alleges his condition *substantially limits* is work. However, Plaintiff has not pointed to any specific facts showing that his condition prevents him from performing a class of jobs or a broad range of jobs in various classes.

Rather, Plaintiff has simply restated the allegations of his pleadings that he is "substantially limited" with respect to several life activities. As the party adverse to a motion for summary judgment, Plaintiff "may not rest upon the mere allegations or denials of [his] pleading."

FED.R.CIV.P 56(e). Plaintiff has failed to show that there is a genuine issue for trial with respect to whether he is "disabled" under the ADA.[3] As the Court finds that Plaintiff has failed to show there is a genuine issue for trial with respect to his claim that his condition constitutes a "disability" under the ADA, the Court does not reach Plaintiff's claims that Defendants did not provide a "reasonable accommodation" of his disability.

2. Claim 2: Disability Discrimination in Violation of FEHA

Plaintiff states a claim for disability discrimination in violation of FEHA, Cal. Gov't Code § 12940 *et seq.*, based on the facts discussed above. On March 10, 1995, the Superior Court granted Defendants' motion for summary judgment with respect to Plaintiff's *identical* FEHA disability discrimination claim in his state court suit. Songer Decl. Exh. 2.

A federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered. *West Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1525 (9th Cir. 1990). Under California law, a final judgment on the merits between parties who in law are the same operates as a bar to subsequent action upon

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[3] *See Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943-44 (10th Cir. 1994) (affirming district court's grant of summary judgment where plaintiff failed to produce any evidence relevant to three factors that should be used in evaluating whether impairment substantially limits plaintiff's employment potential).

the same cause. *King v. International Union of Operating Eng'rs*, 114 Cal. App. 2d 159, 164 (1952). Thus, Plaintiff's second claim is barred by the doctrine of *res judicata*.

3. Claim 3: Age Discrimination in Violation of FEHA

Plaintiff alleges Defendants discriminated against him because of his age, in violation of FEHA, Cal. Gov't Code § 12941. Courts have not adopted a single statement of the elements of a *prima facie* case of age discrimination. *Ewing v. Gill Indus., Inc.*, 3 Cal. App. 4th 601, 610 (1992). California courts look to the parallel federal statute, the Age Discrimination in Employment Act ("ADEA"), for guidance in evaluating a state age discrimination claim. *Nesbit v. Pepsico*, 994 F.2d 703, 704 (9th Cir. 1993) (*citing Stephens v. Coldwell Banker*, 199 Cal. App. 3d 1394, 1399 (1988)).

To establish a *prima facie* case of age discrimination, and thereby shift the burden of proof to defendant, a plaintiff must produce enough evidence to permit the trier of fact to infer the fact of age discrimination. *Selby v. Pepsico*, 784 F.Supp. 750, 754 (N.D. Cal. 1991), *aff'd*, 994 F.2d 703 (9th Cir. 1993). A plaintiff alleging age discrimination may proceed under either of two theories of liability: disparate treatment or disparate impact. *Id.* Plaintiff's claim here falls within the disparate treatment theory.

Proof of disparate treatment requires a showing that the employer treated some people less favorably than others because of their age. *Id.* An employee may establish a *prima facie* case of age discrimination under the

disparate treatment theory by showing that he: (1) was a member of the protected class, age 40-70; (2) was performing his job in a satisfactory manner; (3) was discharged; and (4) was replaced by a substantially younger employee with equal or inferior qualifications. *Id.*

Establishment of a *prima facie* case operates to shift the burden to defendant to produce some evidence that it had legitimate, nondiscriminatory reasons for the employment decision. *Id.* If defendant carries its burden of production, plaintiffs must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by defendant were a pretext for discrimination. *Id.*

The ultimate burden of persuading the trier of fact remains at all times with plaintiffs. *Id.* at 755. Assuming plaintiffs make a *prima facie* case of discrimination, they must also offer specific and significantly probative evidence that defendant's stated reasons are merely a pretext for unlawful discrimination to avoid summary judgment. *Id.*

Here, Plaintiff alleges he is 56 years of age. Plaintiff alleges that beginning in 1989, and continuing throughout his employment to the present, he "has been harassed and singled out at work based upon his age." Compl. ¶ 31. Plaintiff alleges that since 1990, his duties have been reduced, he has been given lesser tasks than younger employees, and he has been denied at least one promotion. *Id.* The Court addresses each of Plaintiff's contentions in turn.

First, Plaintiff alleges he has been harassed and singled out at work because of his age. However, Plaintiff

presents no evidence to support this vague contention. For example, Plaintiff presents no evidence of comments or correspondence disparaging, or even referencing, his age. Nor does Plaintiff present any other evidence that would permit the Court to infer the fact of age discrimination in the form of harassment.

Second, Plaintiff alleges his duties have been reduced because of his age. However, Defendants present the declarations of Plaintiff's supervisors, Defendants Baker and Tamayo, in which both state that Plaintiff's duties have not been reduced. Baker Decl. ¶ 34; Tamayo Decl. ¶ 22. Plaintiff presents no evidence refuting these declarations, indicating a reduction in his duties, or supporting even an inference of reduction in his duties because of his age.

Third, Plaintiff alleges he has been given "lesser" tasks because of his age. However, Defendant Tamayo states that Plaintiff's primary project during the past several years has been the preparation of HCD's contingency plan. Tamayo Decl. ¶ 7. In his deposition, Plaintiff states that he does not consider this project a "lesser" task, and states that "[i]t's a very good project." Songer Decl. Exh. 4 (22:26-28; 23:12). Plaintiff presents no evidence of lesser tasks to which he has been assigned, much less evidence he has been assigned to them because of his age.

Fourth Plaintiff alleges he was denied a promised promotion because of his age. Plaintiff asserts that in February 1989 he was provisionally promoted. Plaintiff's Decl. ¶ 4. He alleges that Defendant Baker told him he

would be given the permanent position. *Id.* at ¶ 8. However, Plaintiff provides no evidence that he was denied this promotion because of his age. Moreover, no Associate Systems Analyst at HCD has been promoted to the Senior Systems Analyst classification. Garrett Decl. ¶ 15; Songer Decl. Exh. 5 (Plaintiff's Admissions #3).[4]

Finally, the Court notes that Plaintiff has neither been demoted nor had his pay decreased. Songer Decl. Exh. 5 (Plaintiff's Admissions #5). His benefits, job classification, and job title have remained constant. His work hours have not been reduced. Tamayo Decl. ¶ 22. There is no objective indicia of any materially adverse employment action. Plaintiff simply alleges that his job responsibilities have changed, and that he has received less important jobs, but he presents no evidence even tending to show a change in his duties, much less a change in his duties because of his age.

He does allege that between 1989 and 1992 he attended fewer meetings than he did previously. Plaintiff's Decl. ¶¶ 10, 13. However, he presents no evidence to buttress this assertion. The only colorable allegation that his work situation has changed is his allegation that he has been given no performance evaluations. *Id.* ¶ 9. However, in his deposition, he admits that no one in the office has ever made a comment about his age, and that there

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[4] The Court notes that the younger man whom Plaintiff alleges took Plaintiff's job, Floyd Garrett, who is African-American and has Multiple Sclerosis, holds the same title as Plaintiff, and has not been promoted, although he is eligible for a promotion. Garrett Decl. ¶ 12, 15.

have been no documents referring to his age. Songer Decl. Exh. 4 (54:10, 15).

Thus, in the absence of evidence supporting his claims of adverse employment actions because of his age, the Court cannot infer age discrimination. Defendants have carried their initial burden of demonstrating that summary judgment is proper with respect to Plaintiff's claim for age discrimination in violation of FEHA. Plaintiff has failed to designate specific facts showing that there is a genuine issue for trial. Thus, summary judgment is appropriate with respect to Plaintiff's claim for age discrimination in violation of FEHA.

4. Claim 4: Retaliation in Violation of FEHA

Plaintiff contends Defendants retaliated against him because of his complaints against the County, in violation of FEHA, Cal Gov't Code § 12940 *et seq.* Plaintiff alleges that as a result of complaints he filed with the Department of Fair Employment and Housing ("DFEH") on August 5, 1993, of which Plaintiff alleges Defendants were notified, and as a result of his attorney's correspondence with Defendants with respect to Plaintiff's situation, "defendants have singled out plaintiff at work and treated him differently than all other employees." Compl. ¶ 39.

To state a *prima facie* case of retaliation, Plaintiff must show (i) that he engaged in a protected activity; (2) that the County subjected him to adverse employment action; and (iii) that there is a causal link between the protected activity and the County's action. *Flait v. North Am. Watch*

Corp., 3 Cal.App. 4th 467, 476 (1992) (*citing Wrighten v. Metropolitan Hosps., Inc.*, 726 F.2d 1346, 1354 (9th Cir. 1984)). If a plaintiff successfully establishes the elements of a *prima facie* case, the defendant must "articulate a legitimate nonretaliatory explanation" for its acts. *Id.* Plaintiff must then show that the proffered explanation is merely a pretext and that an unlawful, retaliatory motive more likely caused the adverse job action. *Id.*

In his deposition, Plaintiff testified that the alleged retaliation by Defendants consisted of "harassment, being ignored, being denied training. I can't think of anything else." Songer Decl. Exh. 4 (55:24-25). He states the alleged "harassment" was "not being given work" and "being ignored." *Id.* at 56:8-11. Plaintiff testified that no other forms of harassment after he returned to work in 1993 "pop in mind." *Id.* at 56:16. In his complaint, Plaintiff alleges that the four instances of Defendants' alleged failure to accommodate his disability were also retaliatory.

First, Plaintiff alleges Defendants retaliated against him by harassing him in the form of ignoring him and not giving him work. However, Plaintiff presents no evidence of a lack of work, and no evidence of harassment or lack of attention at all, much less evidence of harassment stemming from his complaints against the County. Plaintiff alleges no untoward comments or behavior by Defendants tending show that Defendants were retaliating against Plaintiff for his previous complaints.

Second, Plaintiff alleges Defendants retaliated against him by failing to provide him with training. However, Plaintiff admits that Defendants provided him with

the "Elite" training materials. Defendants present the declaration of Fin Park, the Date Base Administrator for the County's Department of Information Services ("DIS").[5] Mr. Park states that DIS has relied "almost exclusively" on the "Elite" NATURAL training materials for the training of County analysts in NATURAL. Park Decl. ¶ 7. Moreover, "Elite" is the only formal training provided the other HCD Systems Analyst. Garrett Decl. ¶ 4.[6] Plaintiff has pointed to no specific facts refuting any of this evidence. Thus, Plaintiff's allegation that he was denied training is insufficient to demonstrate a triable issue of fact with respect to Plaintiff's retaliation claim.[7]

The Court turns now to the four instances of Defendants' alleged failure to accommodate Plaintiff's disability, which Plaintiff also alleges constitute illegal retaliation against him by Defendants. First, Plaintiff alleges Defendants failed to transfer him to a different job in retaliation for his prior complaints. Defendants argue that the County-designated physician who examined Plaintiff reported that Plaintiff's condition did not require

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[5] DIS manages the training resources for data base-related software for the majority of the County's agencies and departments. Park Decl. ¶ 2.

[6] Mr. Garrett states in his declaration that he learned NATURAL entirely from the "Elite" training materials. Garrett Decl. at ¶ 4.

[7] Plaintiff also alleges that Defendants' refusal to authorize Plaintiff's request to attend an out-of-town seminar at County expense constitutes retaliation against Plaintiff for his prior discrimination complaints. The Court considers this a different allegation from Plaintiff's assertion that Defendants denied him training altogether, and addresses it separately below.

a transfer. In addition, Defendants present evidence that transfers are individually arranged between County employees and the department to which they seek to be transferred, not by the County. Baker Supp. Decl. ¶ 2 and Exh. 1. HCD has no authority to require another department to accept a transfer of an employee, nor can another department compel HCD to accept a transfer of an employee. Baker Decl. ¶ 19. Plaintiff has offered no evidence demonstrating that these explanations are pretextual reasons intended to hide Defendants' retaliation against Plaintiff.

Second, Plaintiff alleges that the County's refusal to extend his disability "leave without pay with right to return" status beyond one year was in retaliation for his prior complaints. Defendants assert that Section 4.3.1. of the County Compensation Ordinance mandates a one-year period for disability "leave without pay with right to return" status. In her declaration, Janet Fisher, Supervising Personnel Analyst for the County Department of Human Resources ("DHR"), states that in her twenty years at DHR, the County has never deviated from Section 4.3.1. Fisher Decl. ¶ 7. Plaintiff has offered no evidence demonstrating that this explanation is pretextual.

Third, Plaintiff asserts that the County's refusal to permit him to attend an out-of-town training seminar at the County's expense was in retaliation for his prior complaints. As discussed above, Defendants present evidence demonstrating that the "Elite" training materials with which Plaintiff was provided are the materials the County primarily has used to train its analysts in NATURAL. Defendants also assert that budgetary constraints contributed to the refusal to fund the seminar. Plaintiff

argues the latter explanation is pretextual, and presents no argument challenging the former explanation.

Plaintiff asserts that HCD receives its funding from the federal government and thus has no budgetary constraints. However, even if HCD has surplus funds, an explanation that the out-of-town seminar would not be funded because HCD already possesses training materials cannot be considered a pretext in the absence of any evidence tending to show a causal link between Plaintiff's prior discrimination complaints and the County's refusal to fund the out-of-town training seminar Plaintiff desired.

Fourth, Plaintiff alleges that Defendants issued him a written reprimand for sleeping on the job in retaliation for his prior complaints. Defendants submit that expecting employees to remain awake at work is a legitimate explanation for the reprimand. Moreover, Plaintiff does not dispute the allegation that he was sleeping at work. Plaintiff's Opp. at 18. Plaintiff cannot successfully argue that Defendants' expectation that its workers be awake during work hours is a pretextual explanation for Plaintiff's reprimand.

As discussed above, Plaintiff seeks to amend his complaint to add factual allegations pertaining to a suspension from work that Plaintiff is presently serving. Plaintiff alleges this suspension is additional evidence of retaliation against him by Defendants. Also as noted above, on November 29, 1995, Magistrate Judge Moskowitz extended the discovery cut-off date in this case to December 15, 1995, to enable Plaintiff to conduct discovery with respect to his suspension. The Court agrees with Judge

Moskowitz that Plaintiff's suspension could be probative of his retaliation claim. Therefore, the Court declines to grant summary judgment at this time with respect to Plaintiff's claim for retaliation in violation of FEHA.

Finally, the Court addresses Plaintiff's contention that pursuant to Federal Rule of Civil Procedure 56(f), summary judgment is inappropriate here because "several" depositions are pending which "are expected to produce evidence further supporting plaintiff's opposition [to this motion]." Plaintiff's Opp. at 1. Plaintiff's counsel states that the desired depositions were noticed for October 30 and 31, and November 1, 1995, but that they were not taken as of November 20 because of the "schedules of counsel and the witnesses." Geraci Decl. ¶ 3.

In addition, Plaintiff asserts he did not take the desired depositions because Defendants' counsel had informed him that the witnesses would not answer questions regarding Plaintiff's recent suspension from work, a suspension Plaintiff argues is further evidence in support of his retaliation claim under FEHA. These allegations are not presently contained in the complaint before the Court, but are the subject of Plaintiff's Motion for Leave to Amend scheduled for February 12 1995. As discussed above, and rather than granting Plaintiff's request for a continuance of this motion, the Court will deny at this time Defendants' Motion for Summary Judgment with respect to Plaintiff's claim for retaliation under FEHA.

The hearing on Plaintiff's Motion for Leave to Amend will continue as scheduled on February 12, 1995.

The parties are directed to address at that time any reasons the Court should not remand this case to state court.

Based on the foregoing, the Court rules as follows:

1. Defendants' Motion for Summary Judgment is GRANTED with respect to Plaintiff's First, Second, and Third Claims;

2. Defendants' Motion for Summary Judgment is DENIED with respect to Plaintiff's Fourth Claim;

3. the Pre-Trial Conference date of January 8, 1996 is VACATED; and

4. Plaintiff's Motion for Leave to Amend his complaint will be heard as scheduled on February 12, 1996. The parties are directed to address at that time any reasons which may exist as to why this Court should not remand this case to state court.

IT IS SO ORDERED.
DATED: 12/5/96

/s/ Judith N. Keep
Judith N. Keep, Chief Judge
United States District Court

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No. 99-1679

IN THE

Supreme Court of the United States

COUNTY OF SAN DIEGO; RUDOLPH TAMAYO; EDWARD BAKER; GABRIEL RODRIGUEZ,

Petitioners,

v.

RICHARD McALINDIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ADDITIONAL STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 12102 provides:

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

STATEMENT OF THE CASE

A. The ADA claims.

Plaintiff/Appellant/Respondent Richard McAlindin (hereinafter "McAlindin" or "Respondent") began working for Defendant/Appellee/Petitioner the County of San Diego (hereinafter "County" or "Petitioner") in 1983 as a Computer Systems Analyst in the Housing and Community Development Department. From 1984 to 1989, he received "above-standard" evaluations and was considered an

excellent employee. In 1989, McAlindin reported what he believed to be waste and illegal activity by software vendors. McAlindin's supervisors, including Defendant Edward Baker, rejected his reports and took actions against McAlindin which McAlindin considered retaliatory, causing him anxiety and stress. This anxiety and stress resulted in a disability leave in June 1989 and a 15% permanent disability rating through California workers' compensation system.

Following McAlindin's return to work, retaliatory acts continued, and in May 1992 McAlindin took an eighteen month disability leave (until November 1993). He was diagnosed with anxiety disorder, panic disorder, and somatoform disorder. These disorders substantially limited McAlindin's ability to interact with others both at work (where at times he was essentially "paralyzed" and made outbursts) and elsewhere (staying home and staying away from public places such as shopping centers, restaurants, etc.). They also substantially limited his ability to sleep at night. McAlindin takes medications for the disorders which alleviate, but do not eliminate the disorders.[1] The medications have also caused him to sleep at work (resulting in discipline) and have caused impotence.

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1. In a somewhat misleading passage, the Petition for writ of certiorari (hereinafter "Petition") states "the court (of appeals) noted that McAlindin's anxiety disorders were controlled by medication, thereby negating McAlindin's ability to assert those disorders as a disability." (Citations and notes omitted.) (Pet. at 5.) While the Petition does go on to correctly note that the Court of Appeals did find that McAlindin's declaration created a genuine issue of material fact whether he had a disability "even with medication and other treatment", the Court of Appeals did not find that the medications "controlled" the disorders, or that McAlindin's ability to assert that the disorders were a disability was "negated".

Beginning in May 1993, (after McAlindin had been on disability leave for about one year), McAlindin through counsel in a series of letters which were supported by a psychiatrist's report, requested that the County transfer him to another department under authority of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12100, *et seq.* The psychiatrist's report (ultimately concurred with by three other medical professionals,[2] specifically recommended that McAlindin should not return to his previous position because it would exacerbate his condition and impede his recovery. When McAlindin ultimately returned to work in November 1993, he was (and continued to be) denied a transfer to a different department which would relieve the negative associations and anxiety.

Denied a transfer after he returned to work, McAlindin suffered more adverse employment actions which he considered retaliatory and otherwise unjustified, and which continued to cause him anxiety. McAlindin continued to have the anxiety disorder and to require medication.

B. The Proceedings Below.

The District Court granted summary judgment on the ADA claims, finding that McAlindin's anxiety disorder did not "substantially limit a major life activity." The District Court did not address the issue of reasonable accommodation. (App. 37, 52.)

In a modified opinion, a majority of the Court of Appeals reversed the grant of summary judgment on the ADA claims,[3]

2. App. 10, n.5.

3. McAlindin's suit also alleged retaliation claims under the ADA and state law. Some retaliation claims were dismissed by the District Court's grant of summary judgment which was affirmed on appeal, and some claims were dismissed without prejudice so appellate jurisdiction could be achieved.

finding that McAlindin raised a triable issue regarding whether his mental impairments substantially limited the major life activities of interacting with others, sexual relations and sleeping. (App. 15-17.) The majority opinion also found that due to a "lack of evidence offered by the County and the relative unburdensome nature of the requested accommodation" there was a triable issue regarding whether the requested transfer was a reasonable accommodation. (App. 21-22.)

REASONS FOR DENYING THE WRIT

The writ should be denied because the Ninth Circuit's decision does not conflict with other court of appeals decisions and the Ninth Circuit fully considered and correctly decided the issues in the case presented to it.

I.

THERE IS NO CONFLICT WITH DECISIONS OF THE FIFTH CIRCUIT, SINCE THE NINTH CIRCUIT'S DECISION EXPRESSLY ESTABLISHES THE PROPER NEXUS BETWEEN THE ESTABLISHMENT OF A DISABILITY AND THE REQUIREMENT FOR AN EMPLOYER TO ACCOMMODATE A DISABILITY, (THAT "THE TWO INQUIRIES . . . ONLY INTERSECT TO THE EXTENT THAT MCALINDIN'S DISABILITY MANIFESTS ITSELF IN THE WORKPLACE")

A. The Petition Misleadingly Sensationalizes the Issues.

The Petition relies on supermarket tabloid sensationalism to attract undeserved attention and the confusion caused by the ADA's many terms and definitions to create "conflicts"

where none exist. Like the supermarket tabloids, the Petition's "headlines" (*i.e.*, the questions presented) indeed attract attention, but the "story" inside fails to deliver.

In an attempt to manufacture a controversy justifying granting the Petition, the Petition sensationally distorts the Ninth Circuit's decision, most notably by hopefully asserting that a "question presented" is: "[w]hether the Americans with Disabilities Act ("ADA") requires an employer to provide 'reasonable accommodations' for an employee's alleged impotence".[4]

First, the Court of Appeals majority did not find that impotence was a "disability" or that there was a duty to accommodate a "disability" of impotence. To be covered by the ADA an employee must be a "qualified individual with a disability" who can perform the essential functions of their position with or without reasonable accommodation. 42 U.S.C. § 12111(8). To be "disabled" under the ADA, an individual must have a physical or mental impairment which "substantially limits a major life activity". 42 U.S.C. § 12102(2).

McAlindin's disability as analyzed by the District Court was the mental impairment of anxiety disorder. (App. 47.) The District Court found that the impairment did not substantially limit a major life activity and granted summary judgment. (App. 52.) The majority of the Court of Appeals disagreed, finding that McAlindin's anxiety disorders, panic disorders, and somatoform disorders were mental

4. All three "questions presented" rely on sensationalism and the confusion caused by the ADA's many terms and definitions to create absurd sounding "questions" which do not mention the mental impairments of anxiety disorder, panic disorder and somatoform disorder.

impairments (App. 9); that sleeping, engaging in sexual relations, and interacting with others are major life activities under the ADA (App. 12-15); and that McAlindin raised a triable issue regarding whether he was substantially limited in those major life activities. (App. 15-17.) The Court of Appeals *did not find* that impotence was a "disability" under the ADA. The majority only found, as strongly implied in this Court's opinion in *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998) and other courts, that engaging in sexual relations was a "major life activity" under the ADA. (App. 12.)

To maintain analytical clarity, it is important to note that the ADA is not just an employment statute but also covers, for example, public accommodations. 42 U.S.C. § 12182(a). Nevertheless, both applications share the same statutory standard of disability as set forth in 42 U.S.C. § 12102(2), which requires that an impairment substantially limit one or more major life activities to be a disability under the statute. *See Bragdon v. Abbott*, 118 S. Ct. 2196, 2201-2202 (1998) (holding asymptomatic HIV infection is a disability under the ADA; remanding to determine essentially if filling cavities in a dentist's office would pose "direct threat").

This Court must continue to be cautious, as the Ninth Circuit was, to understand the broader applications of the ADA. The Court must not get distracted, as the Petitioner is, by viewing the ADA's "major life activities" only through the employment prism. Such limited vision could have broad negative implications for public accommodations as well as disability discrimination disparate treatment claims.[5]

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5. Disparate treatment disability discrimination includes adverse employment such as "hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment". 42 U.S.C. § 12112(a).

B. The Ninth Circuit's Decision Agrees on the Same General Principles of Law as, and Does Not Conflict with, Fifth Circuit Precedent.

The Petition's attempt to create a conflict between the Ninth Circuit's decision in this case and two Fifth Circuit opinions, *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 163 (5th Cir. 1996) and *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 522 U.S. 1984 (1998), is fallaciously manufactured out of the confusion sometimes generated by the ADA's many terms and definitions. No real conflict exists.

Taylor is focused on an issue not raised in the case before this Court: whether the plaintiff actually "made a cognizable request for accommodation". *Taylor*, 93 F.3d at 162. The *Taylor* plaintiff told a supervisor he had "bipolar disorder" and asked for help but did not specifically state how the bipolar disorder was a "limitation." *Taylor*, 93 F.3d at 162-163. Relying in part of the pertinent statutory language[6], the Fifth Circuit upheld summary judgment concluding that the plaintiff "failed to adduce any summary judgment evidence showing that he told (his employer) that he was limited as a result of his disability." *Id.*, at 164. *Burch* simply cites *Taylor* and notes that to state a discrimination claim under a failure to accommodate disability theory the Plaintiff must "demonstrate that a substantially limiting impairment somehow affected his ability to perform his job." *Burch*, 119 F.3d at 314, n.4.

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6. 42 U.S.C. § 12112(a)(5)(A). ("[t]he term 'discriminate' includes . . . not making reasonable accommodation to the *known physical or mental limitations* of an otherwise qualified individual with a disability . . .") (emphasis added)).

In the case before this Court, the Ninth Circuit decision was not focused on a "cognizable request for accommodation" and the "known . . . limitations" language of 42 U.S.C. § 12112(a)(5)(A). Instead the Ninth Circuit is focused on the term "disability", which is defined in part as a "physical or mental impairment which substantially limits one or more major life activities." (App. 9-17 (*quoting* 42 U.S.C. § 12102(2)). Even so, the Ninth Circuit decision generally reaches the same result when it stated:

> The two inquiries — namely, whether McAlindin is disabled and what constitutes reasonable accommodation for that disability — only intersect to the extent that McAlindin's disability manifests itself in the workplace.

(App. 2, 20.)

The Petition itself characterizes *Taylor* and *Burch* as stating "there must be a work-related nexus between the alleged impairments and the proposed accommodations". (Pet. at 8.) That is what the Ninth Circuit did when it defined the "intersection" between the issue of McAlindin's disability and what constitutes reasonable accommodation for that disability. Therefore, despite the language nuances, the cases generally state the same correct legal principle and are not in conflict.

The remainder of the Petition's discussion about the alleged "conflict" with the Fifth Circuit's *Taylor* and *Burch* decisions, (Pet. at 9-11), addresses factual disputes about issues the Ninth Circuit's decision properly found presented genuine issues of material fact to be resolved at trial such as the extent of the impairments, (App. 15-17), and does not present conflicts on matters of law between the circuit courts of appeal justifying granting the Petition.

II.

THERE ARE NO CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON ISSUES OF "STRESS" TRANSFERS OR WHETHER AN EMPLOYEE CAN BE ACCOMMODATED IN HIS PRESENT POSITION WHICH WOULD JUSTIFY GRANTING THE PETITION.

While McAlindin was out for eighteen months on stress-related disability leave, he repeatedly requested through counsel, with written support from his psychiatrist, a transfer to a systems analyst position in another department because returning to his former position with its "negative associations" would exacerbate his condition and "impede his recovery". (App. 6.) The County indicated it would place McAlindin's name on an unranked transfer list which County's departments can use if they wish, but would do nothing else, even though the County did not dispute that systems analyst vacancies occur with "some frequency". *Id.*

Before McAlindin returned from the disability leave, the County required McAlindin to be examined by a psychiatrist it retained. The County retained psychiatrist confirmed the diagnosis of anxiety and panic disorder and confirmed that McAlindin should not immediately return to his former position. The County's psychiatrist also concluded, perhaps predictably enough, that with more medication and treatment McAlindin could return to his former job in three to six weeks. The County then told McAlindin that he had to obtain the treatment and return to his job within two months or he would not work for the County again. *Id.*

A. The Third Circuit Has Found Only That a Requested Transfer *to* a Position That Did Not Have "Prolonged and Inordinate Stress" Was Unreasonable, an Issue Not Addressed by the Ninth Circuit.

The Petition mischaracterizes and misapplies the Third Circuit's opinion in *Gaul v. Lucent Technologies*, 134 F.3d 576 (1998), to hopefully create a "conflict" with the Ninth Circuit's opinion (Pet. at 12); and implore this Court "to grant review on the important issue of whether employers bear a duty to transfer an employee whenever he or she is "stressed out" by coworkers". (Pet. at 14.) As will be seen, there is no conflict with the Ninth Circuit decision.

In *Gaul* the plaintiff was stressed by a co-worker and asked "that he be transferred to a lower-stress position". *Gaul*, 134 F.3d at 578. *Gaul*'s plaintiff *further* claimed that he could not "work for any employer, unless he is protected from prolonged and inordinate stress." *Id.* The Third Circuit held that the proposed accommodation of transfer *to* a position where he was protected from "prolonged and inordinate stress" was unreasonable as a matter of law.

In reaching its holding, the Third Circuit reasoned that the "prolonged and inordinate stress" standard was too "amorphous" in that stress levels "at any given moment" are too difficult a standard by which to gauge compliance for an accommodation; that extraordinary employer administrative burdens would be imposed to assign an employee to such a position; and that "by asking to be transferred away from individuals who cause him prolonged and inordinate stress, Gaul is essentially asking this court to establish the conditions of his employment, most notably, with whom he will work." *Gaul*, 134 F.3d at 581.

Regardless of whether the Third Circuit's decision is correct, its opinion does not conflict with the Ninth Circuit's opinion. McAlindin only requested to be transferred to another systems analyst position. Unlike *Gaul*'s plaintiff, McAlindin did not place any limits on the position he requested other than it be another systems analyst position in another department than where he had worked. McAlindin did not make the request that the Third Circuit found unreasonable, *i.e.*, that he not be subjected to "prolonged and inordinate stress." Therefore there is no conflict with the Ninth Circuit's majority opinion.

The Ninth Circuit merely found that "[g]iven the lack of evidence [of undue hardship] offered by the County and the relatively unburdensome nature of the requested accommodation [transfer to another department]," a triable issue was created regarding whether the requested transfer was a reasonable accommodation. (App. 21.) Unlike the employer in *Gaul*, here the County presented no evidence of undue hardship, and the Ninth Circuit correctly decided the case presented to it.

Also, the Petition's attempt to elevate the Third Circuit's third reason that a transfer for *Gaul*'s plaintiff was unreasonable, (that "by asking to be transferred away from individuals who cause him prolonged and inordinate stress, Gaul is essentially asking this court to establish the conditions of his employment, most notably, with whom he will work," *Gaul*, 134 F.3d at 581), into an "important issue" justifying review, (Pet. at 14), is unavailing for at least two reasons.

First, as noted above, there is no conflict with the Ninth Circuit because the Ninth Circuit did not address the request made by *Gaul*'s plaintiff regarding assignment *to* a position where there was "no prolonged or inordinate stress." Second, the cited language is *dicta* in the Third Circuit's opinion. The holding is that the transfer requested was unreasonable. The Third Circuit did not hold that *any* transfer away from persons causing the Plaintiff stress was unreasonable. It only reasoned that such a transfer was unreasonable in Gaul's situation where he was also requesting transfer *to* a position where there is "no prolonged or inordinate stress," a situation not presented to nor decided by the Ninth Circuit.

Thus there is no conflict between *Gaul* and the Ninth Circuit decision, and for this additional reason the Petition should be denied.

B. There Is No Conflict Between The Ninth Circuit's Decision And Other Circuits on When a Transfer or Reassignment Is a Reasonable Accommodation.

The Petition hopefully asserts that the Ninth Circuit's decision is "inconsistent with the decisions of numerous circuits, which *hold* that an employer is not obligated to accommodate an employee by transferring him to a *new* position unless he cannot be reasonably accommodated in his *present* position." (Pet. at 15.) (Emphasis added on first term, emphasis in original on latter two terms; citations omitted.)

This contention is erroneous because the other circuits did not hold there is in all situations a rigid rule-type methodology that there must first be a failed attempt to accommodate the employee in his current position before

the employer is obligated to transfer the employee to a new position. Rather the other circuits noted or mentioned in the course of discussing other issues language indicating that there is a *preference*, not a requirement, that employees first be accommodated in their current position. These cases mostly address a legal issue not addressed in the Ninth Circuit decision before this Court, *i.e.*, whether an employer has a duty to accommodate an employee who cannot perform *at all* in his or her current position with or without reasonable accommodation.

Petitioner urges that EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o) (1999), should be elevated to the status of a regulation when the Interpretive Guidance is itself only the EEOC's commentary on its own regulations. Of course, this Court has not even decided the question of whether the EEOC has the authority to issue these regulations in the first place,[7] let alone whether to give regulation-like effect to a comment on a regulation of unsettled validity. In any event, Petitioner's argument fails for a number of reasons.

First, the EEOC's actual regulation, 29 C.F.R. § 1630.2(o) (1999), provides, like the statute, a non-exclusive listing of possible accommodations stating that: "reasonable accommodation may include . . . reassignment to a vacant position." 42 U.S.C. § 12111(9)(B), 29 C.F.R. § 1630.2(o). Nothing in the statute or the regulation limits "reassignment" to situations when accommodation in an employee's current position has first demonstrably failed. Second, the EEOC's

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7. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 1245-1246 (1999); *Murphy v. United Parcel Service*, 119 S. Ct. 2133, 2138 (1999) (assumes EEOC regulations are valid).

Interpretive Guidance to its own regulation is not even written in a mandatory way but at most suggests a non-binding preference for implementing the "reassignment" accommodation. It states: "*In general*, reassignment *should* be considered only when accommodations within the individual's current position would pose an undue hardship." (emphasis added). "In general" does not mean "always," and "should" does not mean "shall," as the Petition hopefully suggests. As this Court has recognized, the term "should" is "hortatory, but not mandatory". *Olmstead v. L.C.*, 119 S. Ct. 2176, 2186-2187 (1999).

Whatever the EEOC's authority, it clearly did not take the statute's listing of "reassignment to a vacant position" as part of a non-exclusive list of accommodation options and limit its application through a rigid methodology such as the County desires.

Further, none of the cases cited by the Petition "hold that an employee is not obligated to accommodate an employee by transferring him to a *new* position unless he cannot reasonably be accommodated in his *present* position" as promised in the Petition. (Pet. at 15.) (Emphasis in original, citations omitted.)

Smith v. Midland Brake Inc., 180 F.3d 1154, 1170-1171 (10th Cir. 1999) held that a qualified individual with disability under the ADA (42 U.S.C. § 12111(8)) could include one such as *Smith*'s plaintiff who could not perform the essential functions of his current position *at all, even with accommodations*, but could perform in another position, i.e., a position that he "desires." The Tenth Circuit went on to find that "[r]eading § 12111(8) and (9) together, a reasonable accommodation may include a *re*-assignment

from the employee's current job to one that he or she desires." *Smith*, 180 F.3d at 1161. (Emphasis in original). The Tenth Circuit simply found that "[w]hen an employer selects among several possible reasonable accommodations the *preferred option* is always an accommodation that keeps the employee in his or her existing job if that can reasonably be accomplished" *Id.* at 1170. (Emphasis added, citations omitted). This is not inconsistent with the Ninth Circuit decision in the case before this Court. The Ninth Circuit did not hold or state anything in conflict with the "preferred option" language of *Smith*, it simply refused to affirm summary judgment utilizing the Petitioner's desired rigid methodology which "precludes transfer", particularly in the total absence of evidence from the County that such transfer would be an undue hardship. (App. 21-22.)[8] As the Ninth Circuit's decision correctly noted, since the statute permits transfers, the County's arguments that transfers are "precluded" would necessarily conflict with the clear language of the statute. (App. 22, n.10.)

The other cases cited by the Petition (Pet. at 15-16.) similarly do not hold anything in conflict with the Ninth

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8. The factual context of *Smith* was the same factual background expressed in the legislative history, i.e., a reassignment when the employee "can no longer perform the essential functions of the job that he or she has held. Efforts *should* be made, however, to accommodate an employee in the position that he or she was hire to fill before reassignment is considered". H.R. Rep. No. 485(II), 101 Cong., 2d Sess. at 63, *reprinted in* 1990 U.S.C.C. & A.N., 267 345. (*Quoted* in Pet. 16, n.6). Aside from the usual problems of resorting to legislative history, this piece of legislative history does not support the Petition's argument, at least because it used the term "should" which this Court has recognized as "hortatory, but not mandatory" *Olmstead v. L.C.*, 119 S. Ct. 2176, 2186-2187 (1999),

Circuit decision. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1300-1301 (D.C. Cir. 1998), relied on by the Tenth Circuit in *Smith*, concluded like *Smith* that employers have an obligation to reassign employees who cannot perform the essential functions of the position they are in, and did not hold that there was a rigid methodology requiring that in all cases that reassignment need only be considered if the employee cannot perform in the employee's current position. *Gile v. United Air Lines, Inc.*, 95 F.3d 492 (7th Cir. 1996) addressed the same issue as *Smith* and *Aka*, and stated only that the ADA requires reassignment of a disabled employee who can no longer perform the essential functions of the current position, and adds nothing to Petitioner's argument. *Gile*, 95 F.3d at 498-499.[9] In *Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998), the Circuit Court held that the employee failed to propose a reasonable accommodation for her breathing disability and only briefly mentioned in *dicta* the same "preference" language similar to the EEOC's Interpretive Guidance. (*i.e.*, "(*(g)enerally*, transfer or reassignment of an employee is only considered when accommodation within the individual's current position would pose an undue hardship."). *Id.* at 634.

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9. The other Seventh Circuit case cited, *Vollmert v. Wisconsin Dept. of Transp.*, 197 F.3d 298 (7th Cir. 1999) in holding that a particular expert report was sufficient to raise a genuine issue of material fact and that a particular transfer and training was not a reasonable accommodation in that case, simply noted its *Gile* decision and characterized it as having "recognized that reassignment *generally* should be utilized as a method of accommodation only if a person could not fill the requirements of her current position with accommodation." *Id.* at 301-302. (Emphasis added, citations omitted).

In summary, the cases cited in the Petition do not conflict with the Ninth Circuit's decision. The cases cited reflect a preference that *generally* accommodation in the current position *should* be considered first, an issue not addressed in the Ninth Circuit's decision. The Ninth Circuit merely found that in the complete absence of evidence of undue burden by the County, it would not affirm summary judgment on the County's theory that a transfer was "precluded" by the EEOC's Interpretive Guidance. (App. 20-22.)

CONCLUSION

For all the foregoing reasons Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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